87-2100

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JEAN LORETTO, on behalf of herself
and all others similarly situated,

Plaintiff-Petitioner,

v.

GROUP W CABLE, INC. and CITY OF NEW YORK,

Defendants-Respondents,

– and –

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

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(a) Question Presented:

Whether a plaintiff who has obtained a determination of the United States Supreme Court (reversing all holdings of the New York State Courts) that installation of cable television equipment on private property under authority of State law constitutes a taking requiring just compensation (Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419), and who has won additional relief following remand, is entitled to an award of attorneys' fees and costs under 42 U.S.C. § 1988 against all opposing parties?

(b) Parties:

The parties are as set forth in the caption. Teleprompter Manhattan CATV Corp. and Teleprompter Corporation were merged into Group W Cable, Inc. resulting

in a change in title of the action in 1985.

The Attorney General intervened at the Court of Appeals level (first appeal) and filed a brief with this Court as amicus.

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(d) Prior Reported Opinions:

(i) Loretto v. Teleprompter Manhattan CATV Corp., 98 Misc. 2d 944, 415 N.Y.S.2d 180 (Sup. Ct. N.Y. Co. 1979), aff'd without op., 73 A.D.2d 849, 422 N.Y.S.2d 550 (1st Dep't 1979).

(ii) Loretto v. Teleprompter Manhattan CATV Corp., 53 N.Y.2d 124, 440 N.Y.S.2d 843 (1981).

(iii) Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

(iv) Loretto v. Teleprompter Manhattan CATV Corp., 58 N.Y.2d 143, 459 N.Y.S.2d 743 (1983), rearg. denied, 59 N.Y.2d 761, 463 N.Y.S.2d 1030 (1983).

(v) Loretto v. Group W. Cable, ___ A.D.2d ___, 522 N.Y.S.2d 543 (1st Dep't 1987).

(e) Jurisdiction:

(i) Review is sought of the Orders of the New York State Supreme Court, Appellate Division, First Department, entered December 15, 1987 (A-18) and February 10, 1987 (A-21). In the Order of

December 15, the Court granted reargument and adhered to its February 10 decision but its opinion (A-1) altered the basis of the decision.

(ii) An order of the New York State Court of Appeals denying Plaintiff's motion for leave to appeal to that Court was entered March 24, 1988. (A-84).

(iii) This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. § 1257 as review is sought of the final judgment or decree of the highest State Court in which a decision could be had where a title, right or privilege was specially set up or claimed under 42 U.S.C. § 1988. The Appellate Division is the highest State Court in which a decision could be had as

the Court of Appeals declined to review. Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 678 n.1, 88 S.Ct. 1298, 1300 n.1, 20 L.Ed.2d 225, 228 n.1 (1968).

(f) Statute Involved:

42 U.S.C. § 1988 reads (in relevant part):

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(g) Statement of Case:

Plaintiff commenced this action in 1976 to obtain for herself and other New York State property owners a determination of entitlement to just compensation for the property taking occurring

when cable television companies, acting under authority of New York's Executive Law § 828(i)(b), install cable and related equipment on private property without the owner's consent. Section 828 generally authorizes such installations; subsection (i)(b) prohibits landlords from demanding or accepting any compensation with respect to such installations "in excess of any amount which the commission [on cable television] shall, by regulation, determine to be reasonable." The New York Court of Appeals definitively interpreted this provision as granting the Commission the right to award or withhold compensation in its unfettered discretion. The Court of Appeals also held that no taking had occurred under Section 828 as that statute did no more than reasonably restrict property rights under the police power. Loretto v. Teleprompter Manhattan CATV Corp., 53 N.Y.2d

124, 137-138, 151, 440 N.Y.S.2d 843, 848-849, 857 (1981).

On appeal this Court reversed, holding that Teleprompter's conduct constituted a taking for which just compensation is required under the taking clause of the Fifth Amendment incorporated by the Fourteenth Amendment. (458 U.S. 419). This Court remanded to the New York Court of Appeals to consider "[t]he issue of the amount of compensation that is due." (458 U.S. at 441).

This Court's decision was seminal in that it confirmed, for the first time after many decades of analyzing property rights cases purely in terms of balancing competing interests, that a continuing physical occupation of private property, no matter how slight, constitutes a taking on a per se basis. The decision is frequently cited and has been relied upon by this Court in its

subsequent cases supporting private property rights. See, e.g., Nollan v. California State Coastal Comm'n, 483 U.S. ____, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); First Evangelical Church v. County of Los Angeles, 482 U.S. ____, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); Hodel v. Irving, 481 U.S. ___, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987) (Stevens, J., concurring); United States v. Security Industrial Bank, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982).

On remand, the Court of Appeals determined that compensation should be set in the first instance by the New York State Commission on Cable Television, subject to judicial review. The Court also declared invalid as a deprivation of due process the Commission's regulation establishing a 60 day statute of limitations for owner applications for compensation, but omitting any provision for

notice to the owner. Because the statute of limitations was invalidated, the previously terminated rights of thousands of owners to obtain compensation were restored. In addition, the Court of Appeals substantially broadened the class of owners who could recover compensation through the Commission by reinterpreting the scope of the statute and regulations to cover non-rental as well as rental properties and to cover cross-over installations (those crossing over the properties on which they are installed to service other properties) as well as pure non-crossover installations (those servicing only the property on which they are installed). (58 N.Y.2d 143, 459 N.Y.S.2d 743). Having ruled that compensation should be set by the Commission, the Court of Appeals affirmed the original dismissal of the complaint except to reserve review jurisdiction and authority

of the lower court to award trespass damages as to a ten-month period prior to the effective date of Section 828.

As a result, the State Commission adopted a new statute of limitations running from the date on which the cable company gives formal notice to the owner of his rights (or the date of installation if notice is given earlier) (9 NYCRR § 598.5), as well as numerous other changes to conform to the rulings of this Court and the Court of Appeals. Since Group W has evidently made a practice of not giving notice to owners except in the few instances where the company has made new installations, the statute of limitations has not even begun to run in most cases. (Appellant's Reply Br. in App. Div. p. 13).*

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* The Commission has recently (on April 11 and 14, 1988) decided five owner compensation cases. In two cases, it

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Because all class action and Civil Rights Act aspects of the complaint had been dismissed, the only recourse available to Plaintiff and others was through the Commission. Counsel for Plaintiff concluded that an effective presentation to the Commission, including expert testimony, would be extremely

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[fn continued from preceding page] awarded $150 and $400 -- amounts approximating the amounts Plaintiff had sought for individual owners. In two others, the Commission denied the non-monetary relief which had been requested but allowed time for a reapplication for a monetary award above $1. In all five cases, the Commission granted $1 for the basic taking. However, it explained the two additional larger awards as being for a "temporary excessive taking" consisting of the occupancy of more physical space than was actually required for the installation. The Commission offered no explanation for its somewhat unusual view that space necessary for an installation is worth less than space which is not necessary for the installation and that compensation for permanent use should be less than that for temporary use.

These awards came after all action of the New York Courts. It is clear that the awards would not have affected the Appellate Division's holding since that

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expensive and could probably not be pursued on a class basis within the administrative agency. Counsel therefore determined to seek compensation for their services to date (time-charges and disbursements to that point having come to some $466,000) before proceeding further.

An application for counsel fees was made to Special Term of the Supreme Court, New York County, in early 1985. Special Term determined that Plaintiff was entitled to counsel fees under both 42 U.S.C. § 1988 and New York's class action statute, but declined to make any award at the time on the ground that, in

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[fn continued from preceding page] Court's rationale was that Plaintiff can never "prevail" unless she herself first unsuccessfully applies to the Commission. The successful applications of others would merely reinforce the Appellate Division's belief that the statute provides a sufficient remedy for obtaining just compensation and, therefore, Plaintiff has not been deprived of any constitutional right. (See pages 27-33 below).

the absence of any compensation award by the Commission, the fee application was "premature" and/or required prior exhaustion of administrative remedies.* (A-24 ff; A-45 ff).

The Appellate Division affirmed, but, ultimately, on entirely different grounds. Initially, the Appellate Division affirmed without opinion. (A-21). On reargument, evidently influenced by Group W's urging that "plaintiff will have a very large incentive to pursue these proceedings at no cost to herself if her attorneys believe that further prosecution of this case will permit them to recover an attorneys' fee in excess of $500,000"** -- i.e., that fees

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* The administrative remedies referred to by Special Term were for owner compensation. No one has asserted that any administrative agency has authority to award attorneys' fees in this matter.

** Group W's Memorandum to the
[fn continued on next page]

should be denied so that Plaintiff would be financially unable to pursue administrative proceedings to obtain compensation and this Court's directive to provide owner compensation would effectively be defeated -- the Appellate Division issued an opinion absolutely denying fees on the sole ground that Plaintiff had not "prevailed." (A-1).

The Appellate Division's thesis was that, in order to prevail on a taking claim, a plaintiff must show both that there was a taking and that the plaintiff had been denied compensation. The Appellate Division acknowledged that this Court had found a taking, but asserted that Plaintiff had never been denied compensation as she had not applied for compensation after this Court had found

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[fn continued from preceding page] Appellate Division in Support of Group W's Cross-Motion for Leave to Appeal, p. 6.

her entitled to it. In fact, Plaintiff had already been denied compensation because the New York Court of Appeals had expressly ruled that no compensation was required either constitutionally or by statute. Thus, when Plaintiff obtained reversal by this Court, she clearly established both that there had been a taking and that she had been denied compensation.

Motions to the Appellate Division and the Court of Appeals for leave to appeal to the Court of Appeals were denied. This petition follows.

Plaintiff contends that she has prevailed, as contemplated by 42 U.S.C. § 1988, by virtue of her victory in this Court and the favorable changes in law and procedure subsequently achieved in the Court of Appeals and the Commission. The action of the New York Courts in removing the controversy from the courts

into an administrative agency, where fee reallocation is not feasible, then denying fees in this case on the rationale that Plaintiff has personally not pursued an administrative remedy hitherto unavailable, cannot fail to deter the prosecution of Civil Rights Act actions in New York.

(h) Raising of Questions Below:

The question presented here was the primary issue raised at each step of the proceeding below. The Federal Civil Rights Attorney's Fees Awards Act (42 U.S.C. § 1988) was appropriately invoked at each stage.

At Special Term, Plaintiff's application for fees rested largely on 42 U.S.C. § 1988 (it rested additionally on the State class action statute). The Special Term Judge recognized that

Plaintiff had satisfied the requirements of Section 1988. (A-24; A-32-A-39).

The Appellate Division also focused closely on that section. (A-9-A-13).

Plaintiff's motion for permission to appeal to the Court of Appeals also clearly raised the issue. (A-85).

(i) Argument:

Plaintiff Is Entitled to Fees.

There are three basic reasons for review of the decision below: First there is the chilling effect of state courts effectively evading a directive of this Court to award taking compensation by mandating an expensive application procedure, and then denying an award of fees to the party who obtained the catalyzing Supreme Court ruling so that funds for pursuing the application and establishing an effective compensation

precedent are unavailable. Secondly, the case offers a vehicle for more precise definition of two important concepts: (i) what constitutes a Section 1983 cause of action and (ii) what constitutes "prevailing" on it so as to be entitled to fees under Section 1988. Thirdly, the case presents the issue of whether Plaintiff is entitled to an interim award of fees in a protracted litigation once she has achieved success, even if the success is deemed to be only at an interim stage.

(A)

In Civil Rights Act actions, the recovery of attorneys' fees by the prevailing party is allowed as a matter of course in order to encourage private parties to vindicate constitutional rights. Hensley v. Eckerhart, 461 U.S. 424, 429, 103 S.Ct. 1933, 1937, 76

L.Ed.2d 40, 48 (1983). As Congress stated in enacting 42 U.S.C. § 1988,

> If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court. (S. Rep. No. 94-1011 p. 2, reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5910).

The effect of the decision below is precisely the opposite of that sought by Congress.

The decision of the Appellate Division tells counsel here -- and the bar in general -- that after some 11 years of work and the establishment of a major constitutional principle by decision of the United States Supreme Court, counsel cannot recover one penny of fees without commencing an entirely separate administrative proceeding (in which Respondents may quite possibly not be

liable for attorneys' fees)* and prosecuting that at whatever cost, and over however many years, and through however many appeals, it may require.**

The Appellate Division's decision must inevitably chill any

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* The availability of attorneys' fees in administrative proceedings ancillary to judicial actions in which fees are available has been the subject of relatively few decisions with diverging results. Cf. Webb v. Board of Education, 471 U.S. 234, 105 S.Ct. 1923, 85 L.Ed.2d 233 (1985) (denying fees for work on optional administrative proceeding preceding court action), and Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. ___, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986) (awarding fees for administrative enforcement efforts following court proceedings).

** The Commission itself functions at a snail's pace. It took over three years after the effective date of Executive Law § 828 for the Commission to adopt its Statement of General Policy incorporating its one dollar one-time payment notion of "fair" compensation. It then took 1 1/4 years after the Court of Appeals referred the issue of compensation to the Commission (58 N.Y.2d 143, 459 N.Y.S.2d 743 (1983)), for the Commission to promulgate regulations governing the procedure for making such applications, including

[fn continued on next page]

inclination to utilize the courts of the State of New York for the vindication of constitutional rights on behalf of the disadvantaged. Where the prospective economic benefit to any individual plaintiff is small, it becomes unthinkable to contemplate expending the time and money required for a round trip (or two) to the United States Supreme Court. As the Fifth Circuit said in another case which took 11 years for liability to be established, leaving the remedy still to be determined,

> There is a danger that litigants will be discouraged from bringing

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[fn continued from preceding page] complying with the Court of Appeals' mandate to revise the invalid 60 day statute of limitations. Only in April 1988 did the Commission finally render its first five post-Loretto decisions on landlord compensation, some five years after the Court of Appeals directed the Commission to make initial compensation decisions (58 N.Y.2d 143, 459 N.Y.S.2d 743 (1983)). The Commission's written decisions were issued as much as ten months after its minutes reflect that it had ruled on the cases.

> such suits because of the risks of protracted litigation and the extended financial drain represented by such a risk. (James v. Stockham Valves and Fittings Co., 559 F.2d 310, 358 (5th Cir. 1977)).

In the end, with their decisions in this case, the New York courts have effectively frustrated the ability of property owners to obtain the compensation this Court said was their due, and have strongly inhibited the prosecution of Civil Rights Act claims in that State.

(B)

This Court has recently suggested that "[w]hatever the outer boundaries of [the] term ['prevailing party'] may be" presents an open question. Hewitt v. Helms, 482 U.S. ___, 107 S.Ct. 2672, 2675, 96 L.Ed.2d 654, 661 (1987).

We do not suggest that this is an "outer boundaries" case. It is, however, a case in which this Court can

provide immeasurably useful guidance to New York and other courts concerning what constitutes a Section 1983 cause of action and at what point a Civil Rights Act plaintiff "prevails."

(i)

The key issue here is the Appellate Division's misapplication of Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) (holding that a Civil Rights Act cause of action for a taking requires a showing of both a taking and a denial of just compensation), and its blatant textual revision of the Court of Appeals' ruling on remand so as to deprive Plaintiff's counsel of compensation. The essence of the Appellate Division's holding is that Plaintiff never stated a Section 1983 cause of action for a taking because she

satisfied only one part of Williamson's two-pronged test: she established that there was a taking, but not that she had been denied compensation. The Appellate Division reasoned that, because the Court of Appeals reinterpreted Section 828 after this Court's ruling as providing an adequate procedure for obtaining compensation, the procedure had been available all along and Plaintiff cannot have been denied compensation until she unsuccessfully seeks it from the Commission.

The resulting denial of counsel fees was achieved through post hoc interpretative legerdemain. The Appellate Division suggests that Section 828 always provided a remedy for securing just compensation since this Court "specifically left open whether § 828 provided plaintiff a sufficient avenue to obtain compensatory relief" (A-7), and the Court of Appeals, on remand, concluded that it

did. In fact, however, the Court of Appeals, in its first decision, conclusively held that Section 828 did not require that compensation be paid at all and the legislature did not intend any such requirement. And there can be no doubt that this Court did not remotely suggest that it was second-guessing the Court of Appeals' interpretation of the New York statute.

The reasoning of the Court of Appeals demonstrates that Plaintiff clearly had no administrative or judicial remedy for obtaining just compensation prior to this Court's decision. Therefore, when she was denied compensation by the New York Courts, she had satisfied the second part of the Williamson test. The Court of Appeals held that Plaintiff did not have to exhaust administrative remedies before bringing this action (by applying to the Commission for just

compensation) because Section 828 was enacted purely under the police power -- not under the eminent domain power:

> The fact that section 828 (subd 1, par b) of the Executive Law . . . imposes an upper limit upon the amount that may be demanded or accepted by a landlord from a cable television company rather than a requirement that such a company pay compensation to a landowner . . . leads us to conclude that the Legislature in enacting article 28 of the Executive Law, in which section 828 is contained, intended to act under the police power only . . . . (53 N.Y.2d at 138, 440 N.Y.S.2d at 849).

Thus, Plaintiff did not have an administrative remedy for securing eminent domain compensation when she brought suit.

Later in the opinion, the Court of Appeals made the following observation:

> That, as stated in [the quotation] above the Legislature imposed no requirement for compensation makes unnecessary our consideration of many of the eminent domain arguments advanced by plaintiff. (53 N.Y.2d at 143, 440 N.Y.S.2d at 852).

This Court did not, anywhere in its opinion, suggest that the Court of Appeals had left the question of Section 828's meaning open. It said simply that

> The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand. (458 U.S. at 441).

On remand, the Court of Appeals definitively confirmed that it was now reinterpreting Section 828(1)(b). After reciting that this Court had held that "the character of the governmental action involved in section 828 is a taking," the Court of Appeals declared "the section is to be construed so as to sustain its constitutionality in light of that holding if possible . . . ." The Court went on,

> So much of our prior decision as reasoned that the Legislature intended to act under the police power only and not to require the payment of compensation having

> been invalidated by the Supreme Court's holding, the question becomes whether the language of the statute admits of a construction which provides a method of compensation for crossover and noncrossover situations. We conclude that it does. (58 N.Y.2d at 149, 459 N.Y.S.2d at 747; A-58; emphasis in original).

Thus, the Court of Appeals acknowledged that its earlier interpretation of Section 828 did not afford a remedy for taking compensation and that it was reversing its interpretation to provide such a remedy.

In this case, fees were denied simply because an administrative remedy has since been created where none previously existed. This denial of fees cannot be said to be merely the wages of failure which any Civil Rights attorney takes the risk of. Up until the remand to the Court of Appeals, there was a law, confirmed by the Court of Appeals' initial decision on the merits, that no

taking had occurred and there was no right of just compensation and, therefore, no administrative remedy by which a property owner could obtain just compensation. Had the United States Supreme Court's reversal been followed up by a legislative amendment to Section 828 creating a new administrative remedy by which just compensation could be obtained, no one would doubt that Plaintiff had catalyzed that result and would be entitled to attorneys' fees for having done so. See, e.g., Robinson v. Kimbrough, 652 F.2d 458 (5th Cir. 1981). It is logically unfathomable that the result should be any different because the subsequent amendment was accomplished judicially rather than legislatively.

(ii)

After it is determined that Plaintiff has stated a Section 1983 cause

of action, the question of whether she has "prevailed" still remains. This Court has decided relatively few cases on this subject. Most recently, it determined in Hewitt v. Helms, 482 U.S. ___, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987), that an interlocutory success in maintaining the validity of a cause of action does not suffice if the cause of action is still subject to dismissal upon trial or later motion.

In Hewitt, the Court cited Hanrahan v. Hampton, 446 U.S. 754, 757, 100 S.Ct. 1987, 1989, 64 L.Ed.2d 670, 674, reh'g denied, 448 U.S. 913, 101 S.Ct. 33, 65 L.Ed.2d 1177 (1980), for the proposition that "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." (107 S.Ct. at 2675, 96 L.Ed.2d at 661). Whether "some relief on the

merits" means a choate remedy (e.g., an actual award of damages) or, as in this case, a major victory on the question of liability ("entitlement to some relief on the merits" in the actual words of Hanrahan v. Hampton, 446 U.S. at 757 (emphasis added)), is a matter of interpretation. The view that liability (rather than actual relief) suffices receives support from Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970) (fees in a derivative and class action should be awarded when the plaintiff prevails on the liability issue even though damages may never be awarded), and Bradley v. Richmond School Board, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974) (fees are awardable in Civil Rights Act litigation when liability is established even though damages have not yet been fixed). Cf. Hensley v. Eckerhart, 461 U.S. 424,

433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40, 50 (1983) (defining a "prevailing party" as one who has "'succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit'").

Cases in lower courts also vary widely. For example, Group W cited New York City Unemployed and Welfare Council v. Brezenoff, 742 F.2d 718 (2d Cir. 1984), below, denying fees where the applicant won only one minor modification in the city agency regulations, and was denied all other relief. Cases at the other end of the spectrum include Mantolete v. Bolger, 791 F.2d 784 (9th Cir. 1986) (attorneys' fees should be awarded upon winning a reversal on a point of law even though, on remand, the plaintiff may fail to prove liability or entitlement to damages); Fast v. School District of City of Ladue, 728 F.2d 1030

(8th Cir. 1984) (en banc) (plaintiff entitled to fees where she won the right to a written statement of school board's reasons for lay-off and the opportunity for post lay-off hearing, but chose not to pursue the matter further); and Bagby v. Beal, 606 F.2d 411 (3d Cir. 1979) (unlawful employment termination action dismissed as moot but attorneys' fees award sustained on ground that plaintiff had, by the litigation, secured her right to a hearing even though the hearing resulted in termination of her employment).

The question of what constitutes "prevailing" is obviously one of substantial public importance which requires clarification of both its "outer boundaries" (Hewitt v. Helms) and inner core. This case provides an appropriate vehicle.

(C)

On a third level, one may ask whether Plaintiff, who has completed the full judicial cycle and obtained all relief available through the courts, should be required to go through a separate administrative proceeding to fix compensation before her application for attorneys' fees may be considered ripe. If one views each step as discrete, then, quite obviously, Plaintiff has already prevailed to the maximum possible extent. If one views both steps together as parts of a total process, then the question becomes whether Plaintiff is entitled to an interim award upon achieving victory on major elements of the claim even though the amount of compensation remains to be determined.

The Appellate Division rejected the concept of an interim award. That

rejection violates the teaching of the major authorities on the issue. This Court has declared in Bradley v. Richmond School Board, 416 U.S. 696, 723, 94 S.Ct. 2006, 2022, 40 L.Ed.2d 476, 495 (1974), that "[t]o delay a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel . . .." Fees are, therefore, awardable on an interim basis when the plaintiff has achieved substantial success on the merits, such as by establishing liability, even though damages are left to be fixed and may be minimal or non-existent. Bradley, supra; Mills v. Electric Auto-Lite Co., supra. Cf. Hanrahan v. Hampton, 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed.2d 670, reh'g denied, 448 U.S. 913, 101 S.Ct. 33, 65 L.Ed.2d 1176 (1980) (reversing an interim award of fees on the ground that the plaintiff had not yet established liability).

Here, Plaintiff has won the basic constitutional principle -- that a taking has occurred requiring the payment of just compensation -- and has won certain substantive relief absolutely, for example, the enlargement of the statute of limitations restoring the rights of some 16,000 class members to pursue claims. There remains, however, the highly theoretical and remote possibility that the Commission would award only nominal compensation and that the courts would sustain such an award.* But that possibility is irrelevant: appellate courts have rather consistently sustained very large attorneys' fee awards on small or non-existent damages awards so that, even if Plaintiff ultimately recovers little compensation, counsel would still

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* Again, the Commission has, in fact, made significant monetary awards. See footnote, pages 14-16, supra.

be entitled to substantial fees.* See, e.g., City of Riverside v. Rivera, 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986) ($245,456.25 in fees on a judgment of $33,350):

> Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards. (477 U.S. at 574).
>
> * * * *
>
> A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. (477 U.S. at 578).

See also DiFilippo v. Morizio, 759 F.2d 231 (2d Cir. 1985) ($27,832.82 fees;

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* If one were to conclude that a minimal compensation award would diminish the amount of fees to which Plaintiff's counsel would be entitled, it would be far more appropriate to grant an interim fee award reflecting the minimum amount to which counsel would be entitled (subject to later upward adjustment) than to deny fees altogether.

$2,250 damages); Skoda v. Fontani, 646 F.2d 1193 (7th Cir. 1980), on remand, 519 F. Supp. 309 (N.D. Ill. 1981) ($6,086.12 fees; $1 nominal damages); Nephew v. City of Aurora, 830 F.2d 1547 (10th Cir. 1987) (en banc), cert. denied, ___ U.S. ___, 108 S.Ct. 1269, 99 L.Ed.2d 481 (1988) ($12,500 fees; $1 nominal damages); Dean v. Civiletti, 670 F.2d 99 (8th Cir. 1982) (reasonable fees required; $1 nominal damages); Spano v. Simendinger, 613 F. Supp. 124 (S.D.N.Y. 1985) ($62,078.21 fees; $2,250 damages).

The question of the parameters of the Hewitt v. Helms decision again comes into play. To the extent that it suggests that the plaintiff must personally realize some substantial direct benefit from the litigation in order to be entitled to fees, does it qualify the right to interim awards authorized by this Court in Bradley v. Richmond School

Board and Mills v. Electric Auto-Lite Co.? This is surely a question of profound public interest on which further explication from this Court would be most desirable.

CONCLUSION

The petition for certiorari should be granted and the case scheduled for argument.

Respectfully submitted,

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APPENDIX

APPENDIX

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[Supreme Court, Appellate Division, First Department]

Murphy, P.J., Sandler, Milonas, Rosenberger, Smith, JJ.

M-1120
M-1491

Loretto v. Group W. Cable

M-1526
M-1546

The motion of plaintiff Jean Loretto for reargument or for leave to appeal is denied in its entirety, without costs.

The cross-motions of defendants Group W. Cable, Inc. and the City of New York and of intervenor State of New York for leave to appeal are granted to the extent of deeming their motions as ones for reargument which we grant, and upon reargument we adhere to our affirmance of the appealed order which denied plaintiff's motion for attorneys' fees, but do so for the reasons stated hereinafter, without costs.

Reargument is granted in this matter to clarify the basis of our affirmance

of the appealed order denying as "premature" plaintiff's motion to recover attorneys' fees. The order had been affirmed without opinion.

In passing upon the motion, Special term held that the plaintiff "must be deemed a prevailing party" within the meaning of 42 USC § 1988 and that as a prevailing party, plaintiff might eventually be entitled to an award of attorneys' fees to be assessed against defendants and the intervenor. Plaintiff's motion for a fee award was denied only because, in the court's view, the impact of plaintiff's lawsuit could not yet be evaluated. In view of its ruling that attorneys' fees would eventually be proper under 42 USC § 1988, the court found it unnecessary to reach the question of whether attorneys' fees might also be awarded pursuant to CPLR 909.

The court did, however, suggest that although no notice to the class certified in this action was ever given, the class action might nevertheless remain viable and that attorneys' fees pursuant to CPLR 909 might eventually be awarded out of whatever judgment fund resulted after proceedings before the State Commission on Cable Television had run their course.

Although we think that Special Term correctly denied the motion for attorneys' fees, we think that the reasoning leading to the determination was erroneous in several respects, and unless clarified will lead to future confusion. Accordingly, we adhere to our initial affirmance but for the reasons which follow.

This action, initially seeking recovery primarily for trespass, was com-

menced by the plaintiff in 1976. Plaintiff alleged that she had sustained some $1 million in damages as a result of defendant cable television company's installation upon the roof of her premises certain equipment necessary to provide cable TV service to one of her tenants and to tenants in adjoining buildings. She also alleged that defendant's use of her premises for its equipment, purportedly authorized by section 828 of the Executive Law, constituted a taking of her property without just compensation, and that she had been deprived of her property without due process of law. Initially, plaintiff's complaint was dismissed by Special Term which held on summary judgment that defendant's installation of its cable facilities on petitioner's building was indeed authorized by Executive

Law § 828[1] and that such law was a valid exercise of the state's police power.

---

1 Executive law § 828 provides in relevant part:

> No landlord shall
>
> a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require:
>
> i. that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants;
>
> ii. that the cable television company or the tenant or a combination thereof bear the entire cost of the installation, operation or removal of such facilities; and
>
> iii. that the cable television company agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities.
>
> b. demand or accept payment from any tenant, in any form, in exchange for permitting

(Footnote 1 continued on next page)

This Court affirmed as did the Court of Appeals which, in essence, held that Executive Law § 828 did not authorize such interference with petitioner's property rights as would amount to a taking. (Loretto v. Teleprompter CATV, 53 NY2d 124, 151). The United States Supreme Court reversed upon the "the very narrow holding" that the "otherwise valid regulation so frustrates property rights that compensation must be paid." (Loretto v. Teleprompter CATV, 458 U.S. 419, 425-426, 441). On remand, the Court of Appeals, noting that the Supreme

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(Footnote 1 continued from previous page)
cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, be regulation, determine to be reasonable.

Court had not questioned the validity of Executive Law § 828 as an exercise of the state's police power, and that the Court had specifically left open whether § 828 provided plaintiff a sufficient avenue to obtain compensatory relief, went on to hold that § 828 did in fact provide a means for plaintiff to obtain just compensation as it permitted plaintiff to submit a claim for reasonable compensation to the State Commission on Cable Television. (See Executive Law § 828[1][b]). The Court of Appeals although leaving intact the dismissal of the original complaint retained jurisdiction over the matter to review whether the compensation fixed by the Commission constituted just compensation within the meaning of the Constitution (Loretto v. Teleprompter CATV, 58 NY2d 143).

Neither plaintiff nor any other landlord in the putative class certified in this action has, since the Court of Appeals' February, 1983 remand decision, made application to the Cable Commission for reasonable (now referred to in the Commission regulations as "just") compensation. Instead, plaintiff in December, 1984 filed the present motion to recover more than half a million dollars in attorney's fees from the defendants and the intervenor. Plaintiff sought this recovery on the ground that she was the prevailing party in a civil rights action and so was entitled to attorneys' fees pursuant to 42 U.S.C. §§ 1983 and 1988. 42 USC § 1988 provides:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1966 [sic] of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the pre-

> vailing party other than the United States, a reasonable attorney's fee as part of the costs" (emphasis added).

Plaintiff also sought to recover attorneys' fees pursuant to CPLR 909 which provides:

> R 909. Attorneys' fees.
>
> If a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorneys' fees to the representatives of the class based on the reasonable value of legal services rendered and if justice requires, allow recovery of the amount awarded from the opponent of the class.

To state a claim as a "prevailing party" for attorneys' fees under 42 USC § 1988 plaintiff who relies upon 42 USC § 1983 must first demonstrate that she has been deprived of a federal right under color of state law (42 USC § 1983; Gomez v. Toledo, 446 US 635, 640 [1980]); Annunziato v. The Gan, Inc.,

744 F.2d 244, 250 [2d Cir., 1984]). It ought to be clear that plaintiff cannot now establish the deprivation of any federal right. Although plaintiff has established that defendant cable company took her property under color of state law, that alone does not mount to the deprivation of a right. Plaintiff has not shown that her property has been taken without just compensation or due process, and, thus has not demonstrated that the taking which was itself authorized pursuant to a decidedly unobjectionable exercise of the state's police power (458 US 419, 425-426) was effected in a manner violative of her federal rights. As the U.S. Supreme Court has recently observed, "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation (citations omit-

ted)". (Williamson Planning Commission v. Hamilton Bank, 473 US 172, 194 [1985]). The fact that a taking has occurred under color of state law is a necessary condition of plaintiff's 42 USC § 1983 claim, but it is not in itself sufficient to sustain the claim. Until plaintiff applies for just compensation, utilizing the procedures therefor set forth in the Executive Law and regulations promulgated pursuant thereto, and is denied the compensation she seeks she is not in a position to allege sufficiently, much less prove, the denial of any federal statutory constitutional right. The Supreme Court has observed quite pointedly: "because the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied. The nature of the

constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." (emphasis in original). (Id. at 194 n. 13; see also Id. 194-195).

The conclusion which follows is that plaintiff, who to date has not utilized the procedures to obtain compensation which have existed in substantially the form they do today since the enactment of Executive Law § 828 in 1972, cannot now make a § 1983 claim. If she cannot make a § 1983 claim, neither may she seek attorneys' fees as a "prevailing party" pursuant to 42 USC § 1988. Thus, it was error for Special Term to hold that plaintiff was a "prevailing party" within the meaning of 42 USC § 1988. The motion should simply have been denied on the ground that plaintiff

failed to plead and prove any underlying constitutional violation.

As there presently exists no ground to believe that there will be an award of attorneys' fees pursuant to 42 USC §§ 1983 and 1988 in this action, it is necessary to address plaintiff's alternative claim for a fee award pursuant to CPLR 909.

Although a class was certified in this action and the action has been referred to as a class action, the action has not been maintained as such; no notice was ever sent the class. Moreover, the outcome of plaintiff's 11 year effort is that plaintiff and the members of her putative class are consigned to essentially the same process for obtaining compensation as has existed ever since the enactment of Executive Law § 828. Unless, as seems altogether

improbable, it is eventually judicially determined that the very minimal compensation landlords stand to receive under the Executive Law § 828 compensatory scheme (in most cases $1.00) does not amount to just compensation within the meaning of the constitution, plaintiff will not have succeeded in conferring any tangible benefit upon the putative class. At this juncture in the litigation petitioner has prevailed in no more than establishing that the activity authorized by Executive Law §828 does constitute a taking. This, however, is of purely academic interest since, as a practical matter, there is little reason to believe that landlords will receive any greater amount in what is now denominated "just compensation" than they would have previously in what was then termed "reasonable compensation". As

Justice Blackmun perceptively noted in his dissent when this matter was before the U.S. Supreme Court, "If, after the remand following today's decision, this minor physical invasion is declared to be a taking deserving little or no compensation, the net result will have been a large expenditure of judicial resources on a constitutional claim of little moment." (Loretto v. Teleprompter Manhattan CATV Corp., 458 US 419, 456 ftn. 12). We do not think CPLR 909 is correctly used to finance, and thereby encourage, the litigation of claims which have proven as insubstantial as those here made by the plaintiff. The motion for attorneys' fees pursuant to CPLR 909 should then have been denied by Special Term for the aforestated reasons.

We note that even if attorneys' fees were eventually to be awarded pursuant to CPLR 909 they would be properly payable out of the judgment fund, if any, that resulted from the lawsuit. Justice does not require (See CPLR 909 supra) that plaintiff's adversaries, who have at all times acted in good faith, (See Loretto v. Teleprompter Manhattan CATV Corp., 58 NY2d 143, 153) should be forced to pay plaintiff's attorneys. Thus, assuming that this action should be permitted to continue as a class action -- a doubtful proposition considering that the original complaint has been dismissed and that the Court of Appeals has approved the administrative procedures pursuant to which each landlord may seek compensation on an in-

dividual basis[2] -- computation of an award of attorneys' fees if otherwise appropriate, would have to be deferred until such time, if ever, as there existed a judgment fund out of which the fees could be paid.

Having affirmed the denial of plaintiff's motion for the abovestated reasons, we do not think it necessary to reach the State's claim that sovereign immunity insulates it from attorney fee liability under either 42 USC §§ 1983 and 1988 or CPLR 909.

All concur.

Order filed.

[December 15, 1987]

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2 We note that plaintiff conceded on her motion to reargue before Special Term that "any further proceedings in the State Commission on Cable Television must necessarily be conducted on behalf of individual applicants."

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 15, 1987.

Present - Hon. Francis T. Murphy,
Presiding Justice,
Leonard H. Sandler,
E. Leo Milonas,
Ernst H. Rosenberger,
George Bundy Smith,
Justices.

JEAN LORETTO, on behalf of herself and all others similarly situated.

Plaintiff-Appellant-Respondent,

-against-

GROUP W. CABLE, INC. and CITY OF NEW YORK.

Defendants-Respondents-Appellants,

Attorney General of the State of New York,

Intervenor-Respondent.

M-1120
M-1491
M-1526
M-1546

[Appeal Nos. 29128-29N]

The above-named plaintiff-appellant-respondent having moved for reargument or leave to appeal to the Court of Appeals from this Court's order entered on February 10, 1987,

And the defendants-respondents-appellants and intervenor-respondent having each cross-moved for leave to appeal to the Court of Appeals from said order of this Court,

Now, upon reading and filing the papers with respect to the motion and cross-motions and due deliberation having been had thereon; and upon the memorandum decision of this Court filed herein,

It is ordered that plaintiff-appellant-respondent's motion be and the same hereby is denied.

It is further ordered that the cross-motions for leave to appeal to the

Court of Appeals are hereby granted to the extent of deeming the cross-motions as ones for reargument, which are hereby granted, and upon reargument, the Court adheres to its determination as contained in this Court's order entered on February 10, 1987.

ENTER:

/s/ Harold J. Reynolds

Clerk

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 10, 1987.

Present - Hon. Francis T. Murphy,
Presiding Justice,
Leonard H. Sandler,
E. Leo Milonas,
Ernst H. Rosenberger,
George Bundy Smith,
Justices.

JEAN LORETTO, on behalf of herself and all others similarly situated.

Plaintiff-Appellant-Respondent,

-against-

GROUP W. CABLE, INC. and CITY OF NEW YORK.

Defendants-Respondents-Appellants,

Attorney General of the State of New York,

Intervenor-Respondent.

29128-29N

An appeal and cross-appeal having been taken to this Court by the above-named appellants from two orders of the Supreme Court, New York County (Alfred Ascione, J.), entered on or about June 28, 1985, and December 13, 1985, respectively,

And said appeal and cross-appeal having been argued by Michael S. Gruen of counsel for plaintiff-appellant-respondent, by Michael Lesch, John G. Micolich and George G. Nelson of counsel for defendant-respondent-appellant Group W. Cable, Inc., by Pamela Seider Dolgow and Elizabeth S. Natrella of counsel for defendant-respondent-appellant City of New York, and by Judith A. Gordon of counsel for intervenor-respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order entered on or about June 28, 1985 so appealed from be and the same hereby is affirmed, without costs and without disbursements. The appeal from the order entered on December 13, 1985 be and the same hereby unanimously dismissed as nonappealable.

ENTER:

/s/ Harold J. Reynolds

Clerk.

----------x

JEAN LORETTO, on behalf of herself and all others similarly situated.

Plaintiff, Index No. 8300/76

-against-

#89 of 3/13/85

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK,

Defendants.

----------x

ALFRED M. ASCIONE, J.:

Counsel for plaintiff seeks attorneys' fees as well as costs and disbursements against Group W. Cable, Inc. ("Group W", the successor to the Teleprompter defendants) as well as New York City and the State of New York.

The movants acted as counsel for plaintiff as to this proceeding. They seek attorneys' fees pursuant to CPLR 909 and 42 U.S.C.A. 1988. This action

was brought as a class action in regard to an estimated 16,000 television installations. The legal battle was carried through the entire New York State court system up to the Court of Appeals and then to the United States Supreme Court. Movants seek almost $1.5 million in fees plus the vacatur of awards previously obtained against the plaintiff. Movants also move to amend the caption of the action to reflect the fact the Teleprompter defendants have been merged in Group W Cable, Inc.

Plaintiff commenced this proceeding in 1976 in which she sought damages on her behalf and on the behalf of other real property owners in a similar position caused by what she claimed was an unconstitutional taking of private property on the part of the Teleprompter defendants by installing cables and

other cable television components without compensation nor consent of the owners. Plaintiff contends the cables, etc. were installed pursuant to Executive Law, § 828. Plaintiff states that prior to the enactment of § 828 (its effective date was January 1, 1973), the cable television companies sought permission before they installed their equipment and paid the owner 5% of the gross receipts realized from those installations. After § 828 was enacted, plaintiff charges the State Cable Television Commission with the help of the cable companies arbitrarily set all applications from owners for compensation at one dollar ($1.00). Thus, faced with this conduct, plaintiff claims her only recourse was to begin this proceeding.

Movants point out that the Teleprompter defendants had able counsel, all aspects of the action that could be were litigated. Movants note the Teleprompter defendants were joined by the State of New York and New York City. All this, movants claim, amounted to a great deal of work. Movants contend the State of New York by the Attorney General exceeded its mandate under Executive Law § 72 in defending the constitutionality of § 828 and in effect made itself a true party defendant.

In the Supreme Court, Special Term, Part I, Justice Grossman granted summary judgment in Teleprompter defendants' favor (98 Misc.2d 944). The decision was affirmed in the Appellate Division, First Department (73 AD2d 849). The Court of Appeals (53 NY2d 124), also

affirmed (and the Court concluded the $1 payment was not required).

The U.S. Supreme Court (458 U.S. 419, 102 S. Ct. 3164) in June, 1982, held that any governmentally authorized continuing installation on private property, no matter how trivial and for whatever purpose constitutes a "per se" taking which must be compensated under the 14th Amendment.

Thus, the U.S. Supreme Court reversed the Court of Appeals and it remanded the action for further proceedings not inconsistent with its verdict. The Court of Appeals determined damages should be determined by the State Cable Television Commission (58 NY2d 143).

Movants contend their efforts have resulted in considerable benefits to the class in that the members thereof are entitled to a "just compensation" in

that a taking has occurred (movants project the pool for such compensation based on 5% of the installation fees stand in excess of $9 million at the end of 1982), and the short statute of limitations (60 days) set forth in Executive Law § 828 was declared invalid. Further, movants claim the State Cable Television Commission has adopted new rules (with recommendations by movants) wherein the rights of the property owners as to their ability to recover from cable television companies have been extended.

Movants have set forth in detail the experience and the time expended in this proceeding. Thus, the movants request the counsel fees. Also, a judgment for a bill of costs of defendants was entered in April, 1979 for $300 and defendants filed a bill of costs for

$863.73 in June, 1981 (no judgment has been entered on this). Based on the U.S. Supreme Count decision, movants state these should be vacated.

In reply, Group W opposes the motion for fees on the ground plaintiff was not the prevailing party, the action has been based on claims of trespass and not on the enforcement of a federal right, the action herein has never been maintained as a class action (she was permitted to do so, but the notice to class was adjourned, contends Group W), and no judgment has been entered in favor of the putative class. Also Group W alleges plaintiff has not maintained any tangible benefit for herself or her class (Group W has presented affidavits from its employees which state the landlords have been served with notices of intention to install cable equipment and

the landlords' rights to apply for just compensation as per the new rules of the State Commission on Cable Television but Group W has not received any copies of applications for compensation (thus emphasizing the plaintiff's efforts were for naught).

Group W maintains the only party conceivably guilty of any wrongdoing is the State Commission on Cable Television and the State of New York. Group W contends the plaintiff's success against the State can be classified as a "hint of success". Group W maintains the fact that it (or its predecessors) was regulated by the State does not implicate it nor does it provide a basis for fees under 42 U.S.C.A. §§ 1983, 1988.

Finally, Group W challenges plaintiff's proof for fees is insufficient and the request is excessive. Defendant

City of New York basically agrees with the arguments set forth by Group W (plaintiff has not "prevailed", etc.), and contends it is not liable due to municipality immunity under 42 U.S.C.A. § 1983 (the State of New York did not oppose the instant motion.).

In New York, the general rule is that each litigant is required to absorb the cost of his own attorneys' fees, and a defendant may not be required to pay plaintiff's fees in the absence of a contractual or statutory liability (Mighty Midget v Centennial Insurance Co., 47 NY2d 12).

42 U.S.C.A. § 1988 and CPLR § 909 represent the exceptions to the general rule. 42 U.S.C.A. § 1983 imposes liability on those who under color of law, custom or usage of any state or territory deprive other persons of rights,

privileges or immunities secured by the Federal Constitution. (Gomez v Toledo, 446 U.S. 635). § 42 U.S.C.A. § 1988 states in part; "In any action or proceeding to enforce a provision of section[s] ... 1983 ... the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Attorneys' fees may be awarded pursuant to § 1988 in a state court proceeding (See New York Gaslight Club v Carey, 447 U.S. 54).

The 1976 Civil Rights Attorney's Fees Award Act (42 U.S.C.A. § 1988) sought to create a system of "private attorney generals" to pursue national policy who would be paid by an award of attorney's fees for representing a successful or prevailing party (North-Cross v Memphis Board of Education, 412 U.S.

427). Certainly, fees would be available if it is found the challenged acts violate the prevailing party's constitutional rights (Johnson v Blum, 58 NY2d 454). It is only where the respondents established special circumstances (this would also refer to the State and City defendants. See Riddell v National Democratic Party, 624 F2d 539) which mitigate against awarding a fee to a successful litigant (See Mid-Hudson Legal Services, Inc. v G & U, Inc., 578 F2d 34). Fees are not limited to defendants who have acted in bad faith (See Christianburg Garment Co. v E.E.O.C., 434 U.S. 412; P.S.I. v Carey, 476 F. Supp. 4).

Thus, no bad faith need be shown by plaintiff, and no special circumstances are presented by defendants herein which would preclude plaintiff from obtaining

attorney's fees (Hensley v Eckerhart, 461 U.S. 424; See Carrion v Yeshiva University, 535 F2d 722 where fees were denied plaintiff when it was concluded the litigation "was motivated by malice and vindictiveness and that it was without merit" p. 728). Further, defendants would be able to attempt to show special circumstances if a hearing on the fees is required.

This brings us to the query: was plaintiff a prevailing party under § 42 U.S.C.A. § 1983 so as to be entitled to attorney's fees under § 42 U.S.C.A. § 1988.

First, the plaintiff was not required to specifically plead 42 U.S.C.A. 1983 as to sustain a § 1983 claim against a person or municipality, plaintiff must allege the municipality acted in violation of the plaintiff's federal-

ly guaranteed rights (Klimzak v City of Chicago, 539 F. Supp. 221).

In determining whether to award attorneys' fees in a Civil rights case, the issue as to whether the claimant is a "prevailing party" presents an inquiry which is properly a pragmatic one of both fact and law that will ordinarily range outside the merits of the basic controversy (Bonnes v Long, 599 F2d 1316). Initially, the court should consider the precise factual/legal condition that the fee claimant has sought to change or affect so as to gain a benefit or be relieved of a burden; then the outcome must be considered, in whatever form realized, is one which plaintiff's efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from a burden when measured against the

results sought (Bonnes v Long, supra). Thus, one focuses on the relief ultimately received, not the substantive merits of plaintiff's original claims (Bagby v Beal, 606 F2d 411).

As to the plaintiff, she must be deemed a "prevailing party."

The U.S. Supreme Court, in Loretto v Teleprompter Manhattan CATV Corp., 458 U.S. 419, found § 828 of the Executive Law worked a taking of the plaintiff's property under color of state law for which she is entitled to just compensation under the Fourteenth Amendment instead of the $1, among other accomplishments recited by plaintiff (infra). Further plaintiff served as a "catalyst" (See Parkam v Southern Bell Telephone Co., 433 F2d 421) in obtaining reformation of the recourse available to land-

lords regarding cable television installations.

The fact that the original complaint was "dismissed" and "just compensation" was to be set by the New York State Commission on Cable Television (with this court to review such findings) constitutes merely a technical termination of the complaint wherein the "just compensation" burden has been shifted to a state agency (with the normal Article 78 proceeding possible).

Certainly, the above does not deprive the plaintiff of the status of a prevailing party entitled to reasonable attorneys' fees under U.S.C.A. §§ 1983, 1988 including those from the State of New York (see Alyeska Pipeline Service Co. v Wilderness Society, 421 U.S. 240). Although the state was not named as a party defendant, the relief sought by

plaintiff - for all practical purposes aimed at the Executive Law and the State Commission on Cable Television and the conduct of the Attorney General - in effect made the State of New York a party subject to attorney fees (See Butto v Finney, 437 U.S. 678) all of those ultimately awarded. Certainly, the defendant City, considered a "person" under 42 U.S.C.A. § 1983, while not entitled to absolute immunity thereunder (Morell v Dept. of Social Services of the City of New York, 436 U.S. 658) certainly should shoulder its fair share of reasonable attorneys' fees.

Although it is not necessary at this point to determine whether a viable class action exists here since both the federal and state courts have concurrent jurisdiction over cases alleging violations of 42 U.S.C.A. § 1983 (Young v

Board of Education, 416 F. Supp. 1139; Cooper v Morin, 50 AD2d 32) and thus both may award reasonable fees pursuant to § 1988, the court feels a viable class action under CPLR Article 9 does exist (See CPLR § 901). There exists an order allowing the class action to exist. Further, the Court of Appeals labeled the proceeding a class action (Loretto v Teleprompter, 53 N.Y.2d 124, 133 noting no notice had been given. This court does not see why notice cannot now be given).

In either case, City of Detroit v Grinnell Corp., 495 F2d 448, 470, lists factors to be considered in fixing attorneys' fees (such as 1) whether counsel had the benefit of a prior judgment or a decree in a case brought by the government, 2) standing of counsel, 3) time and labor, 4) magnitude and

complexity of the litigation, 5) responsibility undertaken, 6) amount recovered, 7) arguments, conferences prior to trial, 8) what it would be practicable for counsel to charge a victorious plaintiff. Additional factors such as the risk in litigation, the novelty of the risk presented, and the skill required to obtain a good result. See Washington Federal Savings and Loan Association v Village Mall Townhouses, Inc., 90 Misc.2d 227).

Consistent with the traditional request in this type of proceeding, the judgment fund and its accrued interest is the appropriate source for the payment of plaintiff's attorneys' fees rather than from defendants in a successful class action (Steinberg v Citicorp Credit Services, 110 Misc.2d 804) although the existence of such a fund is

not necessary for an award of fees (Suffolk Housing Services v Town of Brookhaven, 69 AD2d 242).

The court feels the request by counsel for fees at this point is premature. In order to evaluate the true impact of plaintiff's actions and the efforts therby [sic] of her counsel, the court agrees with defendants that the plaintiff should proceed to the State Commission on Cable Television to enable it to assess the "just compensation." If the plaintiff's allegations are true (that there are 16,000 members affected with $9 plus million dollars due), said allegations would provide the requisite pool for attorneys' fees while still providing plaintiff and others with just compensation. A hearing or presentation before the Commission would determine this (along, no doubt, with an Arti-

cle 78 proceeding, another reason this motion is premature) at that point counsel may renew its request, and it will receive full and complete consideration.

Acccrdingly, the motion for counsel fees and costs is denied as premature with leave to renew at the appropriate time. The motion is granted to the extent that the complaint may be amended in that Group W may be substituted for the Teleprompter defendants.

DATED: June 25th, 1985

/s/ AMA
J. S. C.

SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM PART I, NEW YORK COUNTY at the Courthouse thereof, 60 Centre Street, New York, New York, 10007.

Present:
HON. ALFRED M. ASCIONE, JUSTICE.

----------x

JEAN LORETTO, etc.

-against-

TELEPROMPTER MANHATTAN CATV CORPORATION et al.

----------x

The following papers numbered 1 to 15 read on this motion, SUBMITTED

	Papers Numbered
No. 89 on Calendar of MAR 13 1985	
Notice of Motion and Affidavits Annexed	1-5
Answering Affidavits	6-13
* * *	
Exhibits 2 Volumes	14-15
Stipulation-Referee's Report-Minutes	

* * *

Upon the foregoing papers this Motion is decided in accordance with accompanying memorandum decision.

Dated JUN 25 1985 /s/ AMA
J.S.C.

Briefs: Plaintiff's xxx Defendant's xx

* * *

County Clerk's No. 8300 1976

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

----------x

JEAN LORETTO, on behalf of herself and all others similarly situated.

Index No. 8300/76

Plaintiff,

-against-

#130 of 10/23/85

GROUP W. CABLE, INC. and CITY OF NEW YORK,

Defendants.

----------x

ALFRED M. ASCIONE, J.:

The motion and cross motion for reargument are denied. The movants have failed to demonstrate that the court overlooked any relevant fact, misapprehended the law or, for any other reason, mistakenly arrived at its determination (see West Realty Co. v. City of New York, 99 AD2d 708).

The court feels the parties must exhaust their administrative remedies

before "just compensation" may be dispensed. The exhaustion of administrative remedies will provide a clear picture of the true impact of the plaintiff's efforts. This would include where there had been a "taking" of the property of the plaintiffs. This court in its prior determination and the Court of Appeals (see Loretto v. Teleprompter Manhattan CATV Corp., 58 NY2d 143, 147) felt the next step for the fixation of any compensation should be made by the New York State Commission on Cable Television. The parties should exhaust their administrative remedies whereby "just compensation" may be dispensed. Utilizing the administrative procedures will provide a clear picture of the true actual impact of the efforts of the plaintiff Jean Loretto and her counsel.

The doctrine of the exhaustion of administrative remedies requires litigants to address their complaints initially to administrative tribunals rather than the courts and to exhaust all possibilities of obtaining relief through administrative channels before appealing to the court (see Y.M.C.A. v. Rochester Pure Waters District, 37 NY2d 371). This permits the agency an opportunity of develop factual findings to apply its expertise to new issues and to exercise its discretionary powers (see Touche Ross & Co. v. S.E.C., 609 F2d 570).

The Commission on Cable Television, using its expertise, should be permitted to make a determination as to what is "just compensation". Such a determination would be reviewable pursuant to Article 78 with the advantage of a full record. This court cannot make such a

determination now. In light of the fact counsel for the plaintiff seeks in excess of $500,000 in counsel fees, proper procedures should not be short circuited even if each individual plaintiff must commence his or her own proceeding before the commission (a measure of the "impact" of the plaintiff Lorreto's effort?). Any request for relief (from plaintiff or defendants) at this point in the proceeding is totally premature including the issue of costs.

DATED: DEC 6, 1985

/s/ AMA
J. S. C.

FILED December 13, 1985
County Clerk's Office
New York

SUPREME COURT OF THE STATE OF NEW YORK,
SPECIAL TERM PART I, NEW YORK COUNTY
at the Courthouse thereof, 60 Centre Street, New York, New York, 10007.

Present:
HON. ALFRED M. ASCIONE, JUSTICE.

----------x

JEAN LORETTO

-against-

GROUP W CABLE , INC. et ano

----------x

The following papers numbered 1 to 8 read on this motion, SUBMITTED & REFERRED

	Papers Numbered
No. 130 on Calendar of OCT 23 1985	
Order to Show Cause and Affidavits Annexed	1&2
Answering Affidavit & Cross-Motion	5-6
Replying Affidavit & Exhibits A-E	7-8
* * *	
Affidavit of Service	3-4
* * *	

Upon the foregoing papers this Motion is decided in accordance with accompanying memorandum decision.

Dated DEC 6 1985 /s/ AMA
J.S.C.

Briefs: Plaintiff's xx Defendant's x
County Clerk's No. 8300, 1976
Spec I Liber L117 Line 2, 1985

FILED December 13, 1985
County Clerk's Office
New York

STATE OF NEW YORK
COURT OF APPEALS

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1 No. 17 OPINION
JEAN LORETTO, &c.,
Appellant,

TELEPROMPTER MANHATTAN
CATV CORP., et al.,
Respondents.

MEYER, J.

The Supreme Court in reversing our order of affirmance in this case (457 U.S. ____, 102 S. Ct. 3164, 73 L.Ed.2d 868 revg. 53 N.Y.2d 124, 440 N.Y.S.2d 843, 423 N.E.2d 320)[1] and remanding to us for further proceedings not inconsistent with its opinion did not question our holding that section 828 of the Executive Law was a proper exercise of the police power (457 U.S. at p. ____, 102 S. Ct. at pp. 3170-3171) but held

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1 Relevant facts are set forth in our earlier opinion and will not be repeated here, familiarity with that opinion being assumed.

that the "otherwise valid regulation so frustrates property rights that compensation must be paid" (id; see also, 457 U.S. at p. ____, 102 S. Ct. at p. 3179). It expressed no opinion, however, on the amount of compensation due, leaving that question for the courts of this State to determine on remand (457 U.S. at p. ____, 102 S. Ct. at p. 3179).

Before us on remand, plaintiff argues (1) that, her action being in trespass and defendant TelePrompter being without power to condemn, she is entitled to damages on a trespass theory; (2) that section 828 of the Executive Law does not authorize the commission it creates to adjudicate compensation or provide for compensation as to crossover installations; and (3) that the section is unconstitutional because it violates the separation of powers doctrine, and

fails to provide for compensation or security in advance of taking, and violates due process in that notice is not given the owner and that the commission is biased.[2] We conclude that the judgment, 98 Misc. 2d 944, 415 N.Y.S.2d 180, entered by Special Term should be modified (1) to make clear that its declaration of the validity of section 828 is subject to the fixation of compensation by the commission upon application to it, (2) to declare the commission's regulation 598.3 (9 NYCRR 598.3) inva-

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2 She also asks that we fix the rule of damages and pass upon various procedural questions denied by Special Term as moot. Concluding as we do that compensation is to be fixed by the commission subject to review, we do not reach the damage issue. As to the procedural issues, our order is without prejudice to the representation by either party to Special Term of any appropriate issue, including any previously dismissed as moot.

lid, and (3) to retain jurisdiction for the purpose of reviewing whether the compensation fixed by the commission constitutes just compensation within the meaning of the Constitution, but to permit plaintiff, if she be so advised, to proceed with her action in trespass for the period between February 28, 1972, the date on which she took title to 303 West 105th Street, and January 1, 1973, the effective date of section 828. Except as so modified, the judgment should he affirmed, with costs to plaintiff.

I

We held and the Supreme Court agreed that section 828 is a valid exercise of the police power. From the effective date of that section, therefore, Tele-Prompter's "invasion" of plaintiff's property was in pursuance of law and not

a trespass (Brewster v. Rogers Co., 169 N.Y. 73, 80, 62 N.E. 164). As to the period between plaintiff's acquisition of title and the effective date of the section there are, as outlined in our earlier opinion (53 N.Y.2d at pp. 134-136, 440 N.Y.S.2d 843, 423 N.E.2d 320), issues of fact. TelePrompter is, therefore, entitled to partial summary judgment making the declarations outlined above, but as to the period before December 31, 1972, permitting the action to proceed.

Plaintiff argues, however, that although TelePrompter Manhattan was formed under the Transportation Corporations Law it lost its power of condemnation under that law when it was merged into TelePrompter Corporation, a stock corporation, because neither the merger plan nor the certificate of incorpora-

tion of the surviving corporation stated that the power of condemnation was retained. We do not pause to consider whether the power to condemn is essential (see Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870) or whether, as defendants urge, sections 906 (subd. [b], par. [1]) of the Business Corporation Law and section 5 of the Transportation Corporations Law may be read to continue the condemnation power in the surviving stock corporation nonetheless (see Matter of City of New York [New York Water Serv. Corp.], 296 N.Y. 1016, 73 N.E.2d 724, affg. 271 App. Div. 1019, 69 N.Y.S.2d 508, affg. 67 N.Y.S.2d 850, 853 (Sup.); cf. Kittinger v. Churchill, 161 Misc. 3, 14, 292 N.Y.S. 35, affd. on opn. below 249 App. Div. 703, 292 N.Y.S. 51). Accepting the certified documents

of which both sides urge that we take judicial notice (see People v. Flack, 216 N.Y. 223, 110 N.E. 167; Cohen and Karger, Powers of the New York Court of Appeals [rev. ed.], § 168), we conclude that, the merger of TelePrompter Manhattan into TelePrompter Corporation not having occurred until almost two years after the present action was begun and TelePrompter Corporation having thereafter been merged into Group W Cable Inc., a corporation incorporated under the Transportation Corporations Law, the argument, whatever its merit during the hiatus, should not be permitted to frustrate the purpose of the Legislature (see Executive Law, § 811) in enacting section 828 (see Knoth v. Manhattan Ry. Co., 187 N.Y. 243, 252, 79 N.E. 1015; Penthouse Props. v. 1158 Fifth Ave., 256 App. Div. 685, 692, 11 N.Y.S.2d 417; cf.

Zion v. Kurtz, 50 N.Y.2d 92, 102, 428 N.Y.S.2d 199, 405 N.E.2d 681).

For the period prior to enactment of section 828 plaintiff may maintain her action in trespass, therefore, but unless one of her remaining arguments is valid, she is entitled for the period after that date only to compensation as fixed by the commission.

II

We turn then to plaintiff's statutory arguments and note, first, that the United States Supreme Court having held that the character of the governmental action involved in section 828 is a taking which entitles a property owner affected by it to compensation, the section is to be construed so as to sustain its constitutionality in light of that holding if possible (People v. Ferber, 52 N.Y.2d 674, 678, 439 N.Y.S.2d

863, 422 N.E.2d 523; Matter of Lorie C., 49 N.Y.2d 161, 171, 424 N.Y.S.2d 395, 400 N.E.2d 336; People v. Bell, 306 N.Y. 110, 114, 115 N.E.2d 821; McKinney's Cons. Laws of N.Y., Book 1, Statutes, § 150, subd. c). So much of our prior decision as reasoned that the Legislature intended to act under the police power only and not to require the payment of compensation having been invalidated by the Supreme Court's holding, the question becomes whether the language of the statute admits of a construction which provides a method for the determination of compensation for crossover and noncrossover situations. We conclude that it does.

Section 828 (subd. 1, par. b) expressly empowers the commission to determine the reasonable amount to be paid by a cable television company to a prop-

erty owner in exchange for permitting cable television service on his property; subdivision 3 of section 816 authorizes the commission to compel the production of papers, the attendance of witnesses and their examination under oath in order to obtain the information necessary to administer any provision of article 28 of the Executive Law; and subdivision 5 of the same section grants to the commission "all other powers necessary or appropriate to carry out the purposes" of the article. The commission is, therefore, empowered to fix reasonable compensation for a taking and provided with the procedural means for adjudication of that issue. The only seemingly contrary indication in the statute is the presence of the words "by regulation" in section 828 (subd. 1, par. b). However, those words when read

in context are not inconsistent with the power of adjudication given the commission by section 816; what paragraph b of subdivision 1 does is authorize the commission to limit by regulation the highest amount a property owner may receive, unless on application by the property owner to the commission that body, after a section 816 hearing, fixes a higher sum as the reasonable compensation for the particular property.[3] The

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3 Although as noted in footnote 2 we do not now determine the measure of damages, that being for the commission in the first instance, we note, in light of the Supreme Court's ruling, that reasonable compensation does not differ from just compensation, which as a constitutional concept requires the fixing of compensation as of the time of the taking (in plaintiff's case, January 1, 1973, the effective date of section 828) plus interest at the legal rate as it existed during the period between that date and the payment made as a result of the commission determination (City of Buffalo v. Clement Co., 28 N.Y.2d

(Footnote 3 continued on next page)

commission's regulations are entirely consistent with its being so empowered for they expressly provide (9 N.Y.CRR 598.1-598.7) for just such an application and determination and establish rules as to pleadings, hearing and practice before the commission (9 N.Y.CRR 590.3, 590.4, 590.6-590.10, 590.51-590.59) fully compatible with the usual process of adjudication.

For a number of reasons the exclusivity provision of the Eminent Domain Procedure Law (EDPL 101) does not, as

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(Footnote 3 continued from previous page) 241, 254, 266, 321 N.Y.S.2d 345, 269 N.E.2d 895; see San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 656-659, 101 S. Ct. 1287, 1306-1307, 67 L. Ed.2d 551 [Brennan, J., dissenting, but note that three other Justices joined in the dissent and that Justice Rehnquist, while concurring in the majority's dismissal on jurisdictional grounds, announced his acceptance of the principles stated in the Brennan dissent]).

plaintiff suggests, require a contrary conclusion. Foremost is that what we are construing is an Executive Law provision specially enacted to deal with and promote the cable television industry, containing express provision for the determination of reasonable compensation in other than a condemnation context but which, because it has now been held to constitute a de facto taking, must be applied in that context. The procedure established in the Executive Law was established in light of the expertise of the cable television commission, the small amount of space occupied by cable facilities and the large number of individual properties that would be involved if the legislative purpose of "maximum penetration * * * as rapidly as feasible" (Executive Law, § 811) was to be accomplished. It was

enacted three and a half years before the Eminent Domain Procedure Law and was not mentioned in chapter 840 of the Laws of 1977 by which some 30 different laws were amended or repealed in order to conform their provisions to the EDPL. The EDPL being a general rather than a special law, section 828 procedures should not be held to have been superseded by its provisions, the more particularly so because to do so would require first instance court processing of a large number of small claims intended to be dealt with in the courts only by way of review of the commission's determination (see People v. Mann, 31 N.Y.2d 253, 257-258, 336 N.Y.S.2d 633, 288 N.E.2d 595; McKinney's Cons. Laws of N.Y., Book 1, Statutes, §§ 396, 398).[4]

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4 As to the instant action, a further reason that EDPL does not apply is
(Footnote 4 continued on next page)

Nor do crossover installations present a problem in construing the statute. The conclusion reached in our prior opinion was "that the Legislature intended to proscribe interference with access for installation of facilities on the property for whatever purpose without any provision for payment" (53 N.Y.2d at p. 142, 440 N.Y.S.2d 843, 423 N.E.2d 320; emphasis added). The Supreme Court has now held that the Constitution requires payment for both crossover and noncrossover facilities (457 U.S. at p. ____, 102 S. Ct. at

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(Footnote 4 continued from previous page)
section 706 of that law, which expressly provides that an action pending on the effective date of the chapter "may be prosecuted as if this chapter had not been enacted." The present action was begun two and a half years before the effective date of EDPL. We prefer, however, to base our conclusion upon the reasoning set forth in the text.

p. 3178) and the procedural provisions of section 816 are clearly broad enough to encompass determination of compensation for either or both. Although the commission's rules (9 N.Y.CRR 598.1-598.7) do not as presently written expressly include crossovers, they must, as a result of the Supreme Court's holding, be construed impliedly to include them and, we have no doubt, will be promptly amended to conform to that holding.

III

There remain for consideration the alleged constitutional flaws.

A

Plaintiff's separation of powers arguments do not withstand analysis. Neither the Federal nor the State Constitution proscribes determination of compensation for a taking by a commis-

sion rather than a court. Thus in Bauman v. Ross, 167 U.S. 548, 593, 17 S. Ct. 966, 42 L.Ed. 270, the Supreme Court approved of commissioners "appointed by a court or by the executive" and former paragraph (b) of section 7 of article 1 of the New York Constitution, which was repealed in 1964 as "obsolete and superfluous" (McKinney's Cons. Laws of N.Y., Book 2, N.Y. Const., Art. 1, § 7, Historical Note), authorized determination of compensation by commissioners. Plaintiff's emphasis on our reference in Matter of Keystone Assoc. v. Moerdler, 19 N.Y.2d 78, 89, 278 N.Y.S.2d 185, 224 N.E.2d 700, to the determination of compensation as a judicial function is misplaced. What was there held, as the citation of Matter of City of New York (Fifth Ave. Coach Lines), 18 N.Y.2d 212, 218, 273 N.Y.S.2d 52, 219 N.E.2d 410,

shows, was that the Legislature may not itself fix compensation, not that it may not authorize the first instance determination of compensation by commissioners or a commission, subject to later judicial review.

Nothing in article VI of the New York Constitution requires a contrary conclusion. United Baking Co. v. Bakery and Confectionery Workers' Union, 257 App. Div. 501, 14 N.Y.S.2d 74, on which plaintiff relies, is distinguishable, for there the agency's findings would not have been subject to review (id. at p. 506, 14 N.Y.S.2d 74), whereas under section 828 the commission's determination is subject to review, in the instant case, in this proceeding and, in cases not similarly arising, by article 78 review. Nor does subdivision b of section 7 of Article VI of the Cons-

titution require, as plaintiff suggests, that the Supreme Court have "concurrent jurisdiction along with any other court or agency" (emphasis supplied). The subdivision makes no reference whatsoever to agencies as distinct from courts and plaintiff points to nothing else to suggest that administrative agencies cannot be given a first instance adjudicatory function, subject to judicial review.

B

Although advance payment or the provision of security for payment of compensation is the general rule when property is taken for a private use, neither is an absolute in the law of just compensation (Brickett v. Haverhill Aqueduct Co., 142 Mass. 394, 8 N.E. 119; see Cherokee Nation v. Kansas Ry. Co., 135 U.S. 641, 10 S. Ct. 965, 34 L. Ed. 295;

American Tel. & Tel. Co. of N.J., 128 N.J. Super. 238, 319 A.2d 754). The Constitution does not require that the statutory aim of "rapid development of the cable television industry" (Executive Law, § 811; see also § 815, subd. [2], par. [d], cl. [iii]) be frustrated under the circumstances of this case, where TelePrompter has proceeded in good faith under a statutory license not conditioned upon the advance payment of or security for compensation but which must now, as a result of the Supreme Court's ruling, be construed to require adequate compensation. The critical inquiry is whether the due process requirement of just compensation has been met. Where, as here, so far as the record discloses (1) the amount receivable by any single property owner is small, (2) the damage to such an

owner's property by attachment of cable facilities relatively insignificant, (3) TelePrompter has offered in light of the Supreme Court's ruling to post a bond, and (4) the powers of the commission are broad enough to encompass a requirement by rule or order or both of advance payment or security as deemed necessary to assure the adequacy of compensation as to both amount and certainty of payment and Special Term on remand to it will have similar power, there is reasonable certainty that plaintiff and the members of the class as finally determined will receive just compensation for the takings that have resulted from TelePrompter's various entries pursuant to statutory leave. It would, of course, had the statutory scheme been envisioned by the Legislature as a taking, have been better had

the statute included explicit provisions dealing with the problem. Under the circumstances of this case, however, it would be an exaltation of form over substance to invalidate the statutory license, authorized as the Supreme Court has held by the police power, on such a basis.

C

The due process objection predicated on commission bias is sufficiently answered by Withrow v. Larkin, 421 U.S. 35, 56-58, 95 S. Ct. 1456, 1469-1470, 43 L. Ed.2d 712 and Richardson v. Perales, 402 U.S. 389, 410, 91 S. Ct. 1420, 1431, 28 L. Ed.2d 842 and need not be discussed further. Equally unavailing is the suggestion of constitutional impropriety claimed to result from the assessment provisions of section 817 of the Executive Law (People ex rel. New

York Elec. Lines Co. v. Squire, 107 N.Y. 593, 602, 14 N.E. 820, affd. 145 U.S. 175, 12 S. Ct. 880, 36 L. Ed. 666; see, also, Matter of Kings County Light. Co. v. Maltbie, 244 App. Div. 475, 280 N.Y.S. 560). Notably, unlike Ward v. Village of Monroeville, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed.2d 267, there is here no such direct relationship between the commission's finances and its determination of compensation to be paid by CATV companies to property owners as to constitute a denial of due process.

Plaintiff's remaining due process arguments relate to the fact that notice is not required to be given and that the commission's regulations (9 N.Y.CRR 598.3) require that an owner's application be made within 60 days after October 30, 1973 or the date of installation, whichever is later. The notice

problem is not properly before us (see Telaro v. Telaro, 25 N.Y.2d 433, 439, 306 N.Y.S.2d 920, 255 N.E.2d 158; Cohen and Karger, Powers of the New York Court of Appeals [rev. ed.], p. 641), but in any event appears from the stipulated facts no longer to present a problem. The limitation upon presentation of a claim, framed in the context of a police power rather than a condemnation statute, could be construed by the commission to bar claims as to which an owner did not in fact have notice in time to comply with the regulation. Nothing in the statute required the adoption of such a regulation, however, or prevents the commission from adopting a new regulation relating the limitation period to the service of notice upon a property owner. Such problem as the present regulation creates will be sufficiently

taken care of by modifying the judgment to declare the regulation invalid but does not require invalidation of the underlying statute.

For the reasons set forth above the order of the Appellate Division, 73 A.D.2d 849, 422 N.Y.S.2d 550, should be modified, with costs to appellant, and the case remitted to Supreme Court, New York County, for further proceedings in accordance with this opinion and, as so modified, affirmed.

[COOKE, C.J., and JASEN, JONES, WACHTLER, FUCHSBERG and SIMONS, JJ., concur.]

Upon reargument, following remand by the Supreme Court of the United States, order modified, with costs to appellant, and case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed.

Decided February 17, 1983

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

No. 17

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JEAN LORETTO, & c.

Appellant,

v. 8300/76

TELEPROMPTER MANHATTAN CATV CORP., et al.,

Respondents.

----------x

The appelant in the above entitled appeal appeared by Gruen, Muskin & Thau, Esqs.;

The respondent(s) appeared by Shea & Gould, Esqs.; Frederick A.O. Schwarz, Jr., Corporation Counsel; and Robert Abrams, Attorney General also appeared.

The Court, after due deliberation, orders and adjudges that upon reargu-

ment, following remand by the Supreme Court of the United States, order modified, with costs to appellant, and case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed. Opinion by Judge Meyer. Chief Judge Cooke and Judgees Jasen, Jones, Wachtler, Fuchsberg and Simons concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contans a correct record of the proceedings in this appeal in the Court of Appeals and

that the papers rquired to be filed are attached.

/s/ Joseph W. Bellacosa
Joseph W. Bellacosa,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany,
February 17, 1983.

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, 60 Centre Street, New York, New York on the 11th day of July 1983

PRESENT: HON. ALVIN F. KLEIN, JUSTICE.

----------x

JEAN LORETTO, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

-against-

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK,

Defendants-Respondents.

: Index No. 8300/76

: ORDER AND JUDGMENT ON REMITTITUR

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Plaintiff-appellant herein, having appealed to the Court of Appeals of the State of New York, from an Order of the Appellate Division, First Department, entered in the office of the Clerk of

said Court on the 11th day of December, 1979, which Order unanimously affirmed, without opinion, a judgment of the Supreme Court, New York County (Grossman, J.) made on April 2, 1979 and entered on April 11, 1979, which granted summary judgment to the defendants and dismissed the complaint, and the Court of Appeals, having heard said appeal and ordered and adjudged that the Order so appealed from be affirmed, with costs, and the Remittitur of the Court of Appeals having been duly filed in the office of the Clerk of the County of New York; and this Court having made its Order For Judgment on remittitur from the Court of Appeals on May 19, 1981;

AND plaintiff having appealed to the United States Supreme Court from the order and judgment of the Court of Appeals dated May 7, 1981, and the Supreme

Court having noted probable jurisdiction on October 19, 1981, and said appeal having been heard by the United States Supreme Court, and the United States Supreme Court having rendered a decision and order dated June 30, 1982, reversing the judgment of the Court of Appeals and remanding the case;

AND the Court of Appeals having heard the case on remand, and the Court of Appeals having rendered a decision and order dated February 17, 1983, that the order and judgment of the Supreme Court, New York County (Grossman, J.) made on April 2, 1979 and entered on April 11, 1979 be modified and the case remitted to Supreme Court, New York County, in accordance with its decision and, as modified, that such order and judgment be affirmed, and said order of the Court of Appeals dated February 17,

1983 having been duly filed in the office of the Clerk of the County of New York on March 8, 1983;

AND plaintiff having moved for reargument before the Court of Appeals, and said motion for reargument having been denied by order of the Court of Appeals dated April 28, 1983;

NOW, on motion of Shea & Gould, attorneys for Teleprompter Manhattan CATV Corporation and Teleprompter Corporation (the "Teleprompter Defendants"), it is hereby

ORDERED and ADJUDGED, that the Order and Judgment of this Court made on April 2, 1979 and entered on April 11, 1979 in the office of the Clerk of the County of New York is modified as follows:

(a) It is hereby declared that section 828 of the Executive Law represents a reasonable and, therefore, justifiable

exercise of the police power of the State, both with respect to cable TV components placed directly on premises serviced by the Teleprompter Defendants and premises on which equipment is placed to service another building, subject to the fixation of compensation to the owner of such premises by the New York State Commission on Cable Television (the "Commission") upon application to it;

(b) Regulation 598.3 of the Commission (9 NYCRR 598.3) is declared invalid; and

(c) jurisdiction is retained for the purpose of reviewing whether the compensation fixed by the Commission constitutes just compensation within the meaning of the Constitution, and to permit plaintiff, if she be so advised, to proceed with her action in trespass

for the period between February 28, 1972 and January 1, 1973; and to re-present by either party any appropriate issue, including any previously dismissed as moot, and it is further

ORDERED and ADJUDGED that, except as modified hereinabove, the order and judgement made herein on April 2, 1979 and entered on April 11, 1979 in the office of the Clerk of the County of New York remains in full force and effect.

E N T E R:

/s/ AFK
J.S.C.

1-10 Mo. No. 160

Jean Loretto, &c.,

Appellant,

vs.

Group W Cable, Inc., et. al.,

Respondents,

Attorney General of the State of New York,

Intervenor-Respondent.

Motion for leave to appeal denied.

Chief Judge Wachtler took no part.

DECISION COURT OF APPEALS MAR 24 1988

Excerpt from Plaintiff's Motion to N.Y. Court of Appeals for Leave to Appeal

QUESTIONS PRESENTED FOR REVIEW

The following questions, without limitation, will be presented by Plaintiff for review:

1. Is Plaintiff entitled to attorneys' fees as the "prevailing party" in a class action under the Federal Civil Rights Act of 1964 (42 U.S.C. § 1988) and CPLR § 909 where the United States Supreme Court has determined in Plaintiff's favor (reversing this Court) that Defendant Group W's installation of cable television transmission equipment on private property under ostensible authority of Executive Law § 828 constitutes a taking requiring just compensation to be paid, although this Court had

previously ruled that property owners are entitled to no compensation whatsoever other than what the State Commission on Cable Television may grant on a discretionary basis; where this Court then directed the Commission to revise its procedures accordingly and the Commission did so; and where Plaintiff succeeded in eliminating the Commission's former 60-day statute of limitations which had effectively cut off the vast bulk of potential claims, including Plaintiff's?

2. If Plaintiff is the "prevailing party", may the application for attorneys' fees nevertheless be denied as "premature" merely because a proceeding would have to be maintained in an administrative agency to determine Plaintiff's individual damages?

* * *

(2)

No. 87-2100

FILED
AUG 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JEAN LORETTO, on behalf of herself
and all others similarly situated,

Petitioner,

– against –

GROUP W. CABLE, INC. and CITY OF NEW YORK,

Respondents,

– and –

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE DIVISION, FIRST DEPARTMENT,
OF THE SUPREME COURT OF THE STATE OF NEW YORK

MEMORANDUM OPPOSING CERTIORARI

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No. 87-2100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JEAN LORETTO, on behalf of herself
and all others similarly situated,

Petitioner,

– against –

GROUP W. CABLE, INC. and CITY OF NEW YORK,

Respondents,

– and –

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE DIVISION, FIRST DEPARTMENT,
OF THE SUPREME COURT OF THE STATE OF NEW YORK

MEMORANDUM OPPOSING CERTIORARI

Jean Loretto requests plenary consideration of a claim for attorney's fees under the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988, that prior decisions of this Court have resolved against her in every respect.

Ms. Loretto seeks the attorney's fees from Group W Cable, the City of New York and the State of New York (A. 24 [June 25, 1985 supreme court opinion][1]), all styled by the petition (at 1) as "opposing parties." She incurred the fees in an action

[1] References preceded by "A." are to pages of the appendix to the petition.

against Group W's predecessor-in-interest and the City in which she alleged, *inter alia*, that the cable television company's installation of equipment necessary for its service in a building that she owned constituted a taking of her property without just compensation. *Loretto v. Teleprompter Manhattan CATV Corp.*, 98 Misc. 2d 944 (Sup. Ct. N.Y. Co. 1979), *aff'd*, 73 A.D.2d 849 (1st Dep't 1979), *aff'd*, 53 N.Y.2d 124 (1981), *rev'd and remanded*, 458 U.S. 419 (1982), *on remand*, 58 N.Y.2d 143 (1983). *See* A. 3-4 (appellate division opinion).

New York Executive Law § 828(1), which Ms. Loretto challenged as unconstitutional, authorized the installation of the equipment, and, provided at subdivision (b), before the action was commenced in 1976, as now, that a landlord's compensation for the installation could not exceed the amount the New York State Commission on Cable Television, by regulation, determines to be reasonable. On January 15, 1976, also before the action was commenced, the Commission informed landlords that it would construe § 828(1)(b) to "assure" them "just compensation" which, given the "negligible unoccupied space" used for cable television installations, would be nominal "in the absence of a special showing [to the Commission] of greater damages attributable to the taking." Commission Statement of General Policy (Jan. 15, 1976). On August 27, 1976, the Commission set the "reasonable fee" under § 828(1)(b), now termed "just compensation," at $1.00 "absent a special showing [to the Commission] of greater damages attributable to the taking." Commission Clarification of General Policy (Aug. 27, 1976).

The Attorney General appeared in the case on three occasions: when it first was before the New York Court of Appeals, 53 N.Y.2d at 130, 132; when it was before this Court, 458 U.S. at 421 n.*; and when it was before the Court of Appeals on remand from this Court, 58 N.Y.2d at 146. He appeared in the Court of Appeals as intervenor under New York Executive Law § 71,[2] and he appeared in this Court as an *amicus curiae*

---

[2] Executive Law § 71 entitles the Attorney General to intervene in any action or proceeding in which the constitutionality of a New York statute is

(Footnote Continued)

under Supreme Court Rule 36. All of his appearances were in support of the constitutionality of Executive Law § 828(1). See n.2.

Only a "prevailing party" can recover attorney's fees under 42 U.S.C. § 1988, and Ms. Loretto does not satisfy the definition. As this Court said in *Hewitt v. Helms*, 97 S.Ct. 2672, 2675 (1987), "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of [her] claim before [she] can be said to prevail [under § 1988]." *Accord, Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980) (interlocutory award of fees under § 1988 only available to party who has established an entitlement to some relief on the merits). Ms. Loretto has yet to establish the § 1983 claim against Executive Law § 828 (1) on which she relies (petition at 22, 27-33), much less receive any relief on its merits.

Under this Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985), Ms. Loretto's § 1983 claim requires: 1) a taking of her property under color of state law; and 2) the denial of just compensation. *Id.* at 194 ("[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation"); *id.* at 194-95 ("[i]f the government has provided an adequate process for obtaining compensation [for a taking of property,]... claims against the ... [g]overnment are premature until the property owner has availed [herself] of the process").

Ms. Loretto met the first prong of the *Williamson* test when this Court reversed the New York Court of Appeals, holding that the installation of cable television equipment in her building constituted a 'taking.' 458 U.S. at 438, 441. But, she has not met

---

"brought into question," and it imposes a "duty" on him, if he intervenes, to support the constitutionality of the statute.

Executive Law § 71 does not confine the Attorney General's appearance to constitutional arguments. For example, he may urge issues that obviate the need for constitutional adjudication and did so in his first appearance in the Court of Appeals in this case when, at the direction of the court, he briefed Ms. Loretto's standing to challenge the constitutionality of Executive Law § 828(1).

the second prong of the test since she never applied to the Commission for a "reasonable fee" or "just compensation." See p.2. Nor has she shown that the Commission's process for obtaining "just compensation" is inadequate under *Williamson*. *See, e.g.*, petition at 23-24 (suggesting that Commission's process is time-consuming and attorney's fees might not be available); *id.* at 29-30 (suggesting that Commission's process is an administrative remedy that need not be exhausted on a § 1983 claim); *id.* at 29-33 (suggesting that Commission's process was established only after this Court's decision). *Contrast* Commission Statement of General Policy (Jan. 15, 1976) and Commission Clarification of General Policy (Aug. 27, 1976) (both describing pre-litigation Commission process).

Thus, when Ms. Loretto 'won' her case in this Court, all she obtained was the right to proceed on the second prong of the *Williamson* test, no more than the plaintiffs in *Hanrahan v. Hampton*, who were not "prevailing part[ies]" under § 1988, obtained when directed verdicts adverse to them, were reversed, *i.e.*, the right to proceed on the substance of a § 1983 claim. 446 U.S. at 755, 758-59. Indeed, Ms. Loretto obtained less than the *Hanrahan* plaintiffs since her complaint was dismissed, *see Hewitt v. Helms*, 107 S. Ct. at 2675-76 (plaintiff whose complaint was dismissed, not "prevailing party" even if lawsuit was catalyst for subsequent governmental action), and, given the availability of the damages attributable to a 'taking' in the Commission's process, it is unlikely that she will be able to meet the second prong of the *Wiliamson* test if she does apply for compensation. *See* A. 13 (appellate division opinion).

Only a defendant who has been "prevailed against" can be liable for attorney's fees under § 1988, and neither the "opposing parties" (petition at 1) nor the State of New York satisfy the definition. *Kentucky v. Graham*, 473 U.S. 159, 105 S. Ct. 3099, 3104 (1985). As this court said in *Graham*, "liability on the merits and [liability]. . . for fees [under § 1988] go hand in hand." *Id.* "Section 1988. . .does not create fee liability where merits liability is non-existent let alone [liability on]. . .a nonparty," the status of the State of New York in this case. *Id.* at 3106.

Given Ms. Loretto has yet to establish the § 1983 claim on which she relies, see pp. 3-4, none of the opposing parties is liable to her under § 1988 because none is liable to her on the "merits." *Kentucky v. Graham*, 105 S. Ct. at 3104, 3106. The State of New York and the Attorney General are not liable to Ms. Loretto for other reasons as well.

As this Court said in *Kentucky v. Graham*, 105 S. Ct. at 3104, a defendant cannot be "prevailed against" under § 1988 if he has a "legal immunity" from the underlying civil rights suit. *Accord, Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719 (1980) (vacating judgment on merits and award of § 1988 fees against judges of the state supreme court who, in context of case, had absolute legislative immunity). In *Graham*, this Court gave the Eleventh Amendment as one example of immunity from an underlying civil rights suit and, perforce, an award of fees under § 1988. 105 S. Ct. at 3107. The example applies to the State of New York here, the only state entity from which Ms. Loretto, in fact, seeks fees (A. 24).

New York's Eleventh Amendment immunity from Ms. Loretto's claim for fees under § 1988 extends to the Attorney General who, if he was a 'party' to the underlying suit, acted for the State when he submitted his briefs. See pp. 2-3 & n.2. *See Kentucky v. Graham*, 105 S. Ct. at 3105 (acts of a government officer in his official capacity are acts of the government itself). Even if the Attorney General is viewed as having acted in his personal capacity, the State, the entity from which fees are sought for his conduct (A. 24), could not be liable on Ms. Loretto's claim. *Kentucky v. Graham*, 105 S. Ct. at 3106 (nothing in the history of § 1988 suggests that fee liability, unlike merits liability under § 1983, can be imposed on a *respondeat superior* basis).

In sum, Ms. Loretto's claim for fees under § 1988 against the State of New York and the Attorney General is no more than a money claim barred by the Eleventh Amendment. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945).

Therefore, the petition for a writ of certiorari should be denied.

New York, New York
August 23, 1988

Respectfully submitted,

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Attorney General of the
State of New York
Intervenor-Respondent Pro Se

O. PETER SHERWOOD
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(3)

No. 87-2100

Supreme Court, U.S.
FILED
AUG 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JEAN LORETTO, on behalf of herself and all others similarly situated,

Plaintiff-Petitioner,

vs.

GROUP W CABLE, INC. and CITY OF NEW YORK,

Defendants-Respondents,

– and –

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Respondent.

BRIEF OF RESPONDENT GROUP W CABLE, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL LESCH
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QUESTIONS PRESENTED

1. The Petition raises precisely the same question recently decided by this Court in Hewitt v. Helms, 107 S.Ct. 2672, 2674 (1987), namely:

> This case presents the peculiar-sounding question whether a party who litigates to judgment and loses on all of [her] claims can nonetheless be a "prevailing party" for purposes of an award of attorneys' fees.

2. Alternatively, the Petition raises the question whether Petitioner stated and proved a claim under 42 U.S.C. § 1983 for deprivation of her right to just compensation (thereby entitling her to an award of attorneys' fees under 42 U.S.C. § 1988) when Petitioner has never applied for nor been denied just compensation, as required pursuant to this Court's decision in Williamson County Regional

Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

3. In the event that this Court construes 42 U.S.C. § 1988 to entitle Petitioner to an award of attorneys' fees in this case, the Petition raises the question whether this construction of 42 U.S.C. § 1988 would compel a forfeiture of Respondent's property without due process of law when Respondent has been found entirely innocent of any wrongdoing and Respondent's property has not been involved in any wrongful activity.

RULE 28.1 LIST

Respondent Group W Cable, Inc. ("Group W") is now known as ARP Cable, Inc. and is owned by a consortium consisting of the following five members, no one of which owns a controlling share: American Television and Communi-

cations Corporation; Century Southwest Cable Television, Inc.; Comcast Corporation; Daniels & Associates, Inc.; and Tele-Communications, Inc. Cable TV General, Inc., is a less-than-wholly-owned subsidiary of ARP Cable, Inc.

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STATUTES INVOLVED

In addition to 42 U.S.C. § 1988 (quoted in the Petition at page 9), this case involves the following statutes:

Section 828(1)(b) of the New York Executive Law (McKinney's 1982), which provides:

> No landlord shall . . . demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable.

42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance,

> regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Introduction

Petitioner Jean Loretto asserts that she is a "prevailing party" entitled to attorneys' fees under 42 U.S.C. § 1988 even though final judgment has been entered dismissing Petitioner's complaint. The Petition arises from Petitioner's unsuccessful constitutional challenge to Section 828 of the New York

Executive Law, which authorizes a cable television ("CATV") company to install CATV equipment on a landlord's premises and permits a landlord to receive compensation for such installation.

Petitioner makes her claim for attorneys' fees notwithstanding that Respondent Group W, successor-in-interest to original defendants Teleprompter Manhattan CATV Corp. and Teleprompter Corporation ("Teleprompter"), prevailed on one of its alternative defenses to Petitioner's claims after this Court ruled that Section 828 of the New York Executive Law effected a taking that entitled Petitioner to just compensation. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). On remand, the New York courts affirmed the judgment dismissing the complaint on the ground that Section 828 and the regulations of the New York State Commission

on Cable Television (the "Commission") provide Petitioner with a reasonable means to obtain just compensation. Loretto v. Teleprompter Manhattan CATV Corp., 58 N.Y.2d 143 (1983). Petitioner had that right to compensation prior to commencement of this litigation but, to this day, never has applied for an award of compensation. Petitioner therefore has never been denied just compensation, nor has she obtained any benefit as a result of this litigation.

Accordingly, under principles that have been well-established by this Court, Petitioner neither is a "prevailing party" within the meaning of 42 U.S.C. § 1988 (infra, pp. 27-34), nor has she ever stated and proved a claim for the deprivation of a federal right under 42 U.S.C. § 1983 (infra, pp. 34-38). Moreover, an award of attorneys' fees in these circumstances would

constitute a forfeiture of Group W's property and would deny Group W due process of law (infra, pp. 38-42). Finally, Petitioner has shown no reason why certiorari should be granted herein (infra, pp. 42-46).

B. Background

In 1972, the New York Legislature enacted Article 28 of the Executive Law (§§ 811-831), which concerns the regulation of CATV services in New York. Executive Law § 814 created the Commission, and Executive Law § 828 provides for the regulation of relationships among CATV companies, landlords and tenants, including a provision allowing CATV companies to obtain access to a landlord's building subject to the payment of a reasonable fee that is to be determined by the Commission. Section 828(1)(b) thus provides:

> No landlord shall . . . demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable.

Acting pursuant to Article 28 of the Executive Law, the Commission adopted rules and regulations concerning landlord applications for fees under Section 828(1)(b). On January 15, 1976, the Commission issued a Statement of General Policy which clearly demonstrated that landlords who applied to the Commission for a reasonable fee pursuant to Section 828(1)(b) would in fact receive an award of just compensation. The Commission stated:

> the likely purpose of [Executive Law § 828(1)(b)] was to assure that Section 828 did not subject landlords to potentially unconstitutional takings of their property without just compensation. . . . [W]e shall

> construe the reasonable fee provision of Section 828 of the Executive Law to assure that a landlord is not deprived, by reason of a cable television company's assertion of its Section 828 rights, of the right to compensation with which the condemnation procedure of the Transportation Corporations Law would provide him.

In its Statement of General Policy, the Commission also determined that, in view of the "negligible unoccupied space" used by a CATV installation, "the value of the subject easement is nominal" and that landlords would be entitled to only a nominal fee "in the absence of a special showing of greater damages attributable to the taking." On August 27, 1976, the Commission issued a Clarification of General Policy which established that the "reasonable fee" to be awarded to landlords under Section 828(1)(b) would be $1.00 "absent a special showing of greater damages attributable to the taking."

C. Prior Proceedings In This Lawsuit

Petitioner never applied for an award of the reasonable fee to which she was entitled pursuant to Executive Law § 828(1)(b). Rather, claiming that landlords were aggrieved by Section 828 and the actions of the Commission thereunder, Petitioner commenced this action as a putative class action in the New York Supreme Court, alleging that Teleprompter had committed trespass by placing CATV components on landlords' premises. Teleprompter moved for summary judgment seeking dismissal of the complaint in Special Term of the New York Supreme Court on grounds that, inter alia, (i) Executive Law § 828, which authorized the installation of CATV components on Petitioner's property, was a valid exercise of the State's police power and did not effect a taking ("Argument No. 1"); and (ii)

alternatively, if Section 828 did effect a taking, the statute was valid because state law and Commission regulations provided Petitioner a reasonable means for obtaining just compensation ("Argument No. 2").

Special Term upheld Teleprompter's Argument No. 1 by finding that Section 828 did not effect a taking, but rather represented "a reasonable and, therefore, justifiable exercise of the police power." Loretto v. Teleprompter Manhattan CATV Corp., 98 Misc.2d 944, 945 (Sup. Ct. New York Co. 1979). The Court thus did not find it necessary to address Teleprompter's alternative contention (Argument No. 2) that the complaint should be dismissed because state law provided landlords a reasonable means to obtain just compensation. Special Term's decision was affirmed by the Appellate Division and by the Court of

Appeals, which each found it unnecessary to address Teleprompter's alternative argument for dismissal of the Complaint. See Loretto v. Teleprompter Manhattan CATV Corp., 73 A.D.2d 849 (1st Dept. 1979), aff'd, 53 N.Y.2d 124 (1981).

Petitioner then appealed to this Court, which considered only the taking issue. Based on its holding that Section 828 effected a taking (rejecting Teleprompter's Argument No. 1), this Court reversed and remanded the case to the Court of Appeals for further proceedings. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Although this Court found that Section 828 effected a taking, the Court did not reach Teleprompter's Argument No. 2 -- not yet decided by the New York courts -- that state law provided Petitioner with a reasonable means of obtaining just compensation. Indeed, this Court

expressly stated that the "issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand." 458 U.S. at 441.

In such posture, the case returned to the Court of Appeals, which was directly confronted with Teleprompter's Argument No. 2. In its decision on remand, the Court of Appeals agreed with Teleprompter's Argument No. 2 and held that the statutory framework provided Petitioner a reasonable means for obtaining just compensation. Loretto v. Teleprompter Manhattan CATV Corp., 58 N.Y.2d 143, 149-52 (1983). The Court also specifically found that Teleprompter's actions under Section 828 were taken "in good faith under a statutory license." Id. at 153. Teleprompter was not found guilty of any wrongdoing, and the Court expressly upheld

the validity of Executive Law § 828. Id. at 147, 154. The only suggestion that Petitioner may have "prevailed" in this action arises from the Court of Appeals' holding that Commission Regulation 598.3 was invalid because it may have barred a landlord's compensation claim before receipt of notice of the right to compensation. Id. at 154. Nowhere did the Court of Appeals even suggest that Teleprompter had acted improperly; the Court merely held that the Commission had promulgated an invalid regulation -- a claim that the Court of Appeals held had not been properly raised by Petitioner in this lawsuit.[1]

---

[1] Petitioner did not raise the notice issue until the case reached the Court of Appeals on remand -- after this Court's decision on the taking issue. As soon as Petitioner raised the notice issue, (a) Teleprompter promptly and voluntarily waived the bar of Regulation 598.3 with respect to any landlord who had not received actual notice of the right to a hearing, and (b) the New York Attorney General advised the Court of Appeals

(footnote continued)

After the decision of the Court of Appeals on remand, the case was remitted to the Supreme Court, New York County. In an Order and Judgment on Remittitur dated July 11, 1983, Special Term's earlier judgment dismissing Petitioner's complaint was decreed to remain "in full force and effect" except for modifications (i) declaring Regulation 598.3 to be invalid, (ii) permitting Petitioner to apply to the Commission for payment of "just compensation," and (iii) permitting Petitioner to proceed with her individual action in trespass, "if she be so advised," for the period prior to the enactment of Section 828. Petitioner has taken no steps in furtherance of any of these claims.

(footnote continued from previous page)
that the Commission would immediately repeal Regulation 598.3 if Section 828 were otherwise valid. The Court of Appeals therefore found that "the notice problem is not properly before us . . . but in any event appears from the stipulated facts no longer to present a problem" (58 N.Y.2d at 154).

D. Results Of This Lawsuit

The Commission thereafter amended its regulations to clarify that landlords were entitled to make application for "just compensation," rather than a "reasonable fee," for the placement of CATV components on their property. Petitioner never has applied for a payment of compensation either prior to or after this Court's decision -- and Petitioner accordingly has never been denied just compensation for the taking effected by Section 828. Thus, despite twelve long years of litigation, Petitioner has achieved no tangible benefit whatever as a result of this lawsuit -- an outcome that was predicted in Justice Blackman's dissenting opinion when he stated that "[i]f, after the remand following today's decision, this minor physical invasion is declared to be a taking deserving little or no compensation, the

net result will have been a large expenditure of judicial resources on a constitutional claim of little moment." 458 U.S. at 456, fn. 12.

Petitioner nevertheless suggests to this Court (Petition, p. 14, fn) that she may have achieved a benefit for landlords because the Commission recently granted two other landlords compensation awards from two other CATV companies of "$150 and $400 -- amounts approximating the amounts [Petitioner] had sought for individual owners."[2] Although Petitioner indicates that the Commission made such awards for a "temporary excessive taking," Petitioner ne-

---

[2] The two decisions referred to by Petitioner concedely were issued in April, 1988 and thus were not part of the record below and are not properly before this Court. Moreover, Group W was not a party to either of those proceedings, which are in no way binding upon it. In the Commission's two compensation proceedings where Group W has been a party, the Commission granted nominal awards of $1.00 each.

glects to inform this Court that the Commission had full authority to make such awards prior to this litigation. Indeed, as shown at page 13 above, six years before this Court's decision in this case the Commission established that a $1.00 nominal fee award applied only "absent a special showing of greater damages attributable to the taking."

In any event, Petitioner concedes that the Commission's recent compensation decisions support the decision that Petitioner seeks to reverse because "[t]he successful applications of [other landlords] would merely reinforce the Appellate Division's belief that [Section 828] provides a sufficient remedy for obtaining just compensation and, therefore, Plaintiff has not been deprived of any constitutional right" (Petition, p. 16 fn.).

E. Petitioner's Motion For An Award of Attorneys' Fees And The Decisions Below.

In early 1985, Petitioner submitted a motion to Special Term requesting an award of attorneys' fees and costs. As relevant herein, Petitioner asserted that, although not pleaded as such, this action stated a claim under 42 U.S.C. § 1983 and that she was a "prevailing party" who was entitled to attorneys' fees pursuant to 42 U.S.C. § 1988. Special Term held that Petitioner was a prevailing party entitled to attorneys' fees (A-37), but nevertheless denied Petitioner's fee application as "premature" because Petitioner had not received any award of just compensation and thus the Court was unable "to evaluate the true impact of plaintiff's actions and the efforts thereby [sic] of her counsel" (A-42).

On appeal, the Appellate Division affirmed Special Term's decision without opinion (A-21). Upon reargument, the Appellate Division issued an opinion holding that Petitioner was not a "prevailing party" entitled to attorneys' fees pursuant to 42 U.S.C. § 1988. The Court stated (A-9 to A-12):

> To state a claim as a "prevailing party" for attorneys' fees under 42 USC § 1988 plaintiff who relies upon 42 USC § 1983 must first demonstrate that she has been deprived of a federal right under color of state law . . . . . It ought to be clear that plaintiff cannot now establish the deprivation of any federal right . . . . Plaintiff has not shown that her property has been taken without just compensation or due process, and, thus has not demonstrated that the taking which was itself authorized pursuant to a decidedly unobjectionable exercise of the state's police power (458 US 419, 425-426) was effected in a manner violative of her federal rights. As the U.S. Supreme Court has recently observed, "The Fifth Amendment does not proscribe the taking of property; it proscribes

taking without just compensation (citations omitted)". (Williamson Planning Commission v. Hamilton Bank, 473 US 172, 194 [1985]). . . . Until plaintiff applies for just compensation, utilizing the procedures therefor set forth in the Executive Law and regulations promulgated pursuant thereto, and is denied the compensation she seeks she is not in a position to allege sufficiently, much less prove, the denial of any federal statutory constitutional right. The Supreme Court has observed quite pointedly: "because the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." (emphasis in original). (Id. at 194 n. 13; see also Id. 194-195).

The conclusion which follows is that plaintiff, who to date has not utilized the procedures to obtain compensation which have existed in substantially the form they do today since the enactment of Executive Law § 828 in 1972, cannot now make a § 1983 claim. If she cannot make a § 1983 claim, neither may she seek attorneys' fees as a "pre-

vailing party" pursuant to 42 USC § 1988.

The Court of Appeals denied Petitioner leave to appeal from the order of the Appellate Division (A-84), and Petitioner thereafter served her Petition for a writ of certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

Group W respectfully submits that the Petition should be denied because it is clear that Petitioner is not entitled to attorneys' fees as against Group W for at least the following reasons: (a) Petitioner is not the "prevailing party (infra, pp. 27-34); (b) Petitioner has failed to ever state and prove a claim under 42 U.S.C. § 1983 (infra, pp. 34-38); and (c) an award of attorneys' fees against an innocent party such as Group W would compel a forfeiture without due process of law (infra, pp.

38-42). In addition, Petitioner has not demonstrated any basis for granting certiorari in this case (infra, pp. 42-46).

A. Petitioner Is Not A Prevailing Party Herein.

As shown above (pp. 14-19), Petitioner clearly is not a prevailing party herein. Petitioner obtained no relief against Group W and the Court of Appeals held that Teleprompter had "proceeded in good faith under a statutory license" (58 N.Y.2d at 153). Although this Court rejected Group W's Argument No. 1 that Section 828 of the Executive Law did not effect a taking, the Court of Appeals ultimately affirmed the judgment dismissing Petitioner's complaint on the basis of Argument No. 2, i.e., that Section 828 provided Petitioner a reasonable means of obtaining just compensation. Thus, the only hint of success

that Petitioner achieved in this lawsuit was the invalidation of one regulation containing a minor defect that defendants stipulated to cure as soon as it was brought to their attention (see p. 18 fn. 1, supra).

In such circumstances, this Court has made clear that Group W may not be held liable for Petitioner's attorneys' fees when Group W was not the "losing party" and has not been held liable in any manner to Petitioner. Indeed, this Court recently decided the same issue raised by Petitioner in Hewitt v. Helms, 107 S.Ct. 2672 (1987). In Hewitt, this Court held that a plaintiff was not entitled to attorneys' fees under 42 U.S.C. § 1988 where, as here, the complaint was ultimately dismissed on the merits -- even though, as here, plaintiff had achieved some interlocutory

success. This Court stated (id. at 2675):

> Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail. See Hanrahan v. Hampton, 446 U.S. 754, 757 (1980). Helms obtained no relief. . . . The most that he obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim. That is not the stuff of which legal victories are made.

Similarly, Petitioner cannot credibly claim that she has prevailed on the merits when judgment has been entered dismissing her complaint, even though Petitioner received an interlocutory ruling that Executive Law § 828 effected a taking that required the payment of just compensation. The New York Court of Appeals affirmed the dismissal of the complaint based on Group W's alternative Argument No. 2 that state law and Commission regulations provided Petitioner

a reasonable means for obtaining just compensation for the taking. Had the New York courts reversed the arbitrary order in which they addressed the issues presented in this case by dismissing the complaint based upon Argument No. 2 in the first instance and without deciding the taking issue, Petitioner never would have achieved the "success" that she claims from this Court's earlier Loretto decision. In Hewitt v. Helms, 107 S.Ct at 2676-77, this Court made clear that a favorable decision with respect to an issue that ultimately is irrelevant to the merits does not entitle a party to an award of attorneys' fees as a prevailing party:

> These would be no conceivable claim that the plaintiff had "prevailed," for instance, if the District Court in this case had first decided the question of [the alternative defense]. . . . There is no warrant for having status as a "prevailing party" depend upon the essentially arbitrary or-

> der in which District Courts or Courts of Appeals choose to address issues.

Moreover, this litigation -- and particularly this Court's earlier decision in this case -- has not affected Group W's conduct with respect to Petitioner (or other landlords) in any manner. Group W still has the right to install its CATV equipment upon a landlord's property pursuant to Executive Law § 828, whose constitutionality was upheld in all respects by the Court of Appeals. 58 N.Y.2d at 154. Petitioner has not even applied to the Commission for the compensation to which she has always been entitled under Executive Law § 828, much less has she or any other landlord obtained an award from Group W that is in excess of the award that the Commission would have granted in the absence of this litigation.

In Hewitt v. Helms, 107 S.Ct. at 2676, this Court also made clear that a plaintiff's failure to obtain any redress from a defendant precludes an award of attorneys' fees under 42 U.S.C. § 1988:

> In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces -- the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought through the court, but from the defendant. . . . The real value of the judicial pronouncement . . . is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff (emphasis in original).

This Court accordingly concluded that plaintiff in Hewitt was not a prevailing party because the "only 'relief' he received was the satisfaction of knowing that a federal court concluded that his rights had been violated." Id. Peti-

tioner, however, has not even achieved that degree of "moral satisfaction." No court has ever concluded that Petitioner's rights have been violated, and Petitioner has not been denied just compensation for the taking because she has never applied for such an award. Petitioner therefore has no basis for claiming to be the "prevailing party" herein.

Finally, this Court's decision in Kentucky v. Graham, 473 U.S. 159 (1985), confirms that Petitioner is not entitled to attorneys' fees against Group W. This Court clearly held that fee liability does not attach against an innocent party such as Group W (id. at 165, 168):

> [L]iability on the merits and responsibility for fees go hand in hand. Where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not autho-

> rize a fee award against that defendant. . . .
>
> * * *
>
> . . . . Section 1988 simply does not create fee liability where merits liability is non-existent.

Petitioner has not established that Group W has any liability to her, on the merits or otherwise, as a result of this litigation. Under at least two recent decisions of this Court, Petitioner therefore is not entitled to a fee award as a "prevailing party" under 42 U.S.C. § 1988, and the Petition for a writ of certiorari accordingly should be denied.

B. Petitioner Neither Stated Nor Proved A Claim Under 42 U.S.C. § 1983 For Deprivation Of A Federal Right Because Petitioner Never Applied For, And Has Never Been Denied, Just Compensation.

Under this Court's decision in Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), Petitioner's claim that Teleprompter's

installation of CATV equipment on her premises constitutes a taking without just compensation does not state a claim under 42 U.S.C. § 1983 unless Petitioner also alleges and proves that she has no method to obtain just compensation under state law. Here Petitioner can neither allege nor prove the lack of such remedy because the Court of Appeals held that Executive Law § 828 provides Petitioner with a reasonable means to obtain just compensation for the taking of her property (58 N.Y.2d at 149-52). Petitioner accordingly has no claim under 42 U.S.C. § 1983 and no claim for an award of attorneys' fees under 42 U.S.C. § 1988.

Petitioner's contention that she "clearly had no administrative or judicial remedy for obtaining just compensation prior to this Court's decision" (Petition, p. 29) ignores the fact that

Section 828's "reasonable fee" provision and the Commission's procedures promulgated thereunder were in existence prior to commencement of this litigation. As discussed above (supra, pp. 12-13), the Commission's January 15, 1976 Statement of General Policy clearly established that reasonable fee awards granted pursuant to Section 828 would "assure that a landlord is not deprived . . . of the right to compensation with which the condemnation procedure of the Transportation Corporations Law would provide him." Moreover, the Court of Appeals confirmed that the Commission's procedures would ensure an award of just compensation under Section 828 (58 N.Y.2d at 149-50).

This Court made clear in Williamson County that "no constitutional violation occurs until just compensation has been denied" and that the "nature of the

constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action" (473 U.S. at 194, fn. 13, emphasis added). The Court explained (473 U.S. at 194-95):

> If the Government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government for a taking." . . . Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.
>
> . . . [A] property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation. . . . (emphasis added).

In short, under Williamson County Petitioner has no claim under 42 U.S.C.

§ 1983 (and therefore is not entitled to an award of attorneys' fees under 42 U.S.C. § 1988) because Petitioner never made any attempt to obtain just compensation by applying to the Commission. The Commission's Statement on General Policy (supra, p. 12-13) and the Court of Appeals' decisions both before and after this Court's decision (supra, pp. 15-18) confirm that if Petitioner had made such an application, she would have been awarded just compensation. Having failed ever to make an application to the Commission, Petitioner could not prosecute an action under 42 U.S.C. § 1983.

C. An Award of Attorneys' Fees Against Group W Would Violate The Due Process Clause Of The United States Constitution.

The Court of Appeals has held that Teleprompter performed its CATV installations "in good faith under a statutory

license" (58 N.Y.2d at 153), and judgment has been entered herein dismissing Petitioner's complaint. Accordingly, Group W has been held to be entirely innocent of any wrongdoing towards Petitioner, and an award of attorneys' fees against Group W in these circumstances would constitute a forfeiture of its property without due process of law in violation of the United States Constitution.

It is a fundamental principle of our society that no person shall be deprived of property without "due process of law." U.S. Const. amend. V and XIV, § 1. In this case, an award of attorneys' fees against Group W would work a forfeiture of its property in circumstances where Group W has been found innocent of any wrongdoing and where Group W and its property were not involved in any illegal conduct. Such a

forfeiture would deprive Group W of its property without due process of law.

Although the property of an innocent party may be subject to forfeiture if the property is used in illicit activity pursuant to the fiction that the property is guilty of facilitating crime (see Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931)), this Court has recognized that "it would be difficult to reject the constitutional claim of an owner whose property [was] subject to forfeiture . . . [and who] proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689, reh'g denied, 417 U.S. 977 (1974) (emphasis added). Several courts have

that such a forfeiture would violate due process. See United States v. One Tintoretto Painting, 691 F.2d. 603, 608 (2d Cir. 1982) ("forfeiture would simply be an arbitrary act, serving no legitimate government interest, oppressive and harsh, and in our view contrary to the Fifth Amendment"); Edelberg v. Illinois Racing Board, 540 F.2d 279, 283 (7th Cir. 1976) ("Clearly the due process clause of the Fourteenth Amendment protects against unreasonable and arbitrary state deprivation which imposes forfeitures, punishments or costs").

Group W's claim of a constitutional deprivation of property arising from an award of attorneys' fees herein presents a strong case of a due process violation. Not only is there a complete absence of proof of any wrongful activity, but the courts also have found that there has been no "proscribed use of

property" that forms the necessary predicate for a legal forfeiture.

This Court therefore should deny the Petition for a writ of certiorari.

D. Petitioner Has Not Shown Any Reason For Granting Certiorari.

We have shown above (pp. 27 to 42) that Petitioner has no basis for an award of attorneys' fees in this case. Petitioner nevertheless contends that this case merits the Court's attention for three reasons: (1) the alleged "chilling effect" of the decision below upon resort to the courts for vindication of constitutional rights (Petition, pp. 22-26); (2) this case may constitute a vehicle for defining a "Section 1983 cause of action" and a "prevailing party" under 42 U.S.C. § 1988 (Petition, pp. 26-37); and (3) this case will allow this Court to determine whether attorneys' fees may be awarded at an interim

stage of a litigation (Petition, pp. 38-43). None of Petitioner's rationales are persuasive.

Petitioner raises the spectre that the decision below will somehow discourage the bringing of meritorious claims for the vindication of constitutional rights (Petition, pp. 22-26). However, as shown above (pp. 27-34), and as established by this Court in Hewitt v. Helms, 107 S.Ct. 2672 (1987), a prerequisite of an attorneys' fee award under 42 U.S.C. § 1988 is a meritorious claim. But Petitioner's claims herein were not, in fact, meritorious because her complaint has been dismissed and Petitioner has obtained absolutely no redress, much less damages in excess of the "reasonable fee" to which she was entitled prior to commencement of this litigation (supra, pp. 19-22). The decision below therefore will have no

"chilling effect" upon the bringing of meritorious claims for the vindication of constitutional rights.

This Court's recent decisions in Hewitt v. Helms, 107 S.Ct. 2672 (1987), Kentucky v. Graham, 473 U.S. 159 (1985), and Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), also negate any need for this Court to again address the concepts of a "Section 1983 cause of action" and a "prevailing party" under 42 U.S.C. § 1988. Petitioner has raised no uncertainties or ambiguities in the aforementioned opinions that make it appropriate for this Court to revisit these recent decisions. Moreover, to the extent that Petitioner suggests that the Courts of Appeals may be in conflict on such issues (Petition, pp. 36-37), this Court's recent opinions provide the courts with authoritative guidance.

Finally, Petitioner asks this Court to address the issue of whether attorneys' fees should be awarded on an interim basis even as Petitioner acknowledges that this Court has held that an interim fee award should not be made where, or here, "plaintiff had not yet established liability" (Petition, p. 39, citing Hanrahan v. Hampton, 446 U.S. 754, reh'g denied, 448 U.S. 913 (1980)). Moreover, Petitioner relies upon Bradley v. Richmond School Board, 416 U.S. 696, 723 (1974), for the proposition that fees are "awardable on an interim basis when the plaintiff has achieved substantial success on the merits, such as by establishing liability . . . ." (Petition, p. 39). However, as shown above (pp. 27-34), Petitioner has never achieved the "substantial success on the merits" or established any "liability"

that might entitle her to an interim fee award.

Petitioner accordingly has demonstrated no reason why this Court should grant certiorari in this case.

CONCLUSION

For the above reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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(4)

SUPREME COURT, U.S.
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No. 87-2100
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JEAN LORETTO, on behalf of herself and all others similarly situated,

Plaintiff-Petitioner,

v.

GROUP W CABLE, INC. and CITY OF NEW YORK,

Defendants-Respondents,

-and-

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Respondent.

RESPONDENT CITY OF NEW YORK'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

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August 22, 1988

COUNTER-QUESTIONS PRESENTED

1. Whether there is a final appealable state court judgment giving this Court jurisdiction under 28 U.S.C. §1257?

2. Whether petitioner is a prevailing party entitled to attorneys' fees and costs under 42 U.S.C. §1988 since she failed to state and prove a cause of action for deprivation of her right to just compensation pursuant to 42 U.S.C. §1983 where the New York Cable Television statutory scheme was upheld as constitutionally valid, and petitioner has not sought nor been denied just compensation, and her other claims, sounding primarily in trespass, were substantially rejected?

3. Assuming, arguendo, that petitioner is a prevailing party under 42 U.S.C. §1988, whether attorneys' fees may be awarded against intervenor-defendant City of New York under Kentucky v.

Graham, 473 U.S. 159 (1985), where the City has no substantive liability on the merits?

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JEAN LORETTO, on behalf of herself and all others similarly situated,

Plaintiff-Petitioner,

v.

GROUP W CABLE, INC. and CITY OF NEW YORK,

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-and-

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Respondent.

RESPONDENT CITY OF NEW YORK'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

STATEMENT OF THE CASE

The instant case concerns the efforts of plaintiff-petitioner Jean Loretto ("petitioner") to recover attorneys' fees in an action, sounding in trespass and unsuccessfully

challenging the constitutionality of New York Executive Law, section 828, which authorizes installation of cable television equipment on a landlord's premises and provides compensation therefore, following a judgment dismissing her complaint.

Petitioner now seeks to have this Court review by writ of certiorari orders of the New York State Supreme Court, Appellate Division, First Department, entered February 10, 1987 and December 15, 1987 respectively, which affirmed an order and judgment of the New York Supreme Court, New York County, entered June 25, 1985, denying petitioners' application for some $500,000 in attorneys' fees and costs. The Appellate Division held that petitioner, who has never sought nor been denied just compensation for the minimal taking of her property, was not a "prevailing party" pursuant to 42 U.S.C. §1988, where, inter alia, she failed to "allege

sufficiently, much less prove" any federal constitutional violation (A11-A12).[1]

a) Loretto Litigation History[2]

In January 1976, petitioner, the owner of a Manhattan apartment building, commenced this alleged class action in New York Supreme Court seeking over $1,000,000 in damages for alleged trespass by defendants Teleprompter Manhattan CATV Corp. and Teleprompter Corporation (hereafter "Teleprompter" or "Group W").[3]

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[1]Unless otherwise stated, numbers in parentheses refer to pages in the Petitioner's Appendix.

[2]In the interest of judicial economy, we will rely on the statutory background portion of co-respondent-appellee Group W's Brief in Opposition to Certiorari.

[3]Although nominally brought as a class action, no notice was ever given, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, n.4 (1983). Although that notice was postponed by stipulation, id. n.4, that stipulation was only pending disposition of

(Footnote Continued)

The complaint alleged numerous causes of action for trespass by Teleprompter's unlawful installation of cable television ("CATV") components on her property (¶6-23). It also alleged that such installation, pursuant to New York Executive Law, section 828(1)(b),[4] and the corresponding administrative regulations, 9 N.Y.C.R.R. Part 598, constituted a

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(Footnote Continued)
the parties' motions for summary judgment on the underlying action. Petitioner has now recognized that only individual applications may be made for compensation (Pet., p. 16).

[4]Executive Law, section 828(1)(b) provides:

> No landlord shall . . .
>
> b. demand, or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable.

deprivation of property without due process, and, additionally, a taking of property without just compensation (¶25-26).

In her prayer for relief, plaintiff sought: (1) a damages award of $1,000,000 for trespass, including actual damages, and the alleged value of the property rights to Teleprompter, and its "mense profits," i.e., 5% of revenues derived, and (2) to enjoin defendants from placing CATV components on any real property without the owner's written consent. Teleprompter's amended answer raised numerous affirmative defenses, including plaintiff's failure to seek the reasonable compensation available under the Executive Law from the State Commission on Cable Television ("CATV Commission").

Thereafter, in 1977, the City of New York's motion to intervene as a defendant in order to protect the public interest in its role as municipal franchisor under Executive

Law, section 819, was granted. The City sought to ensure the continued growth of cable television service, and to avoid the imposition of extraordinary charges on cable companies, which costs would ultimately be borne by subscribers and result in a decrease in subscriptions. It also sought to prevent landowners from arbitrarily denying tenants access to cable service.

In its answer, the City denied the numerous allegations of trespass, and that there was an unconstitutional taking without just compensation. It pled several affirmative defenses, including that the placement of cable television components on plaintiff's property was authorized by Executive Law, section 828, and that plaintiff had failed to seek compensation from the CATV Commission under Executive Law, §828(1)(b).

Following separate motions for summary judgment dismissing the complaint, by order entered March 14, 1979, the Supreme Court, New York County, granted summary judgment to defendants on the basis of their threshold argument that the Executive Law, section 828, was a valid exercise of the State's police power. Loretto v. Teleprompter Manhattan CATV Corp., 98 Misc. 2d 944, 415 N.Y.S.2d 180 (Sup. Ct., N.Y. Co., 1979). Having made that finding, the Court did not address the defendants' alternative argument that the statute, Executive Law, §828(b)(1), already provided for just compensation, since it provided for payment of a reasonable fee. The Appellate Division, First Department, affirmed, without opinion. Loretto v. Teleprompter Manhattan CATV Corp., 73 A.D.2d 849, 422 N.Y.S.2d 550 (1st Dept., 1979).

Following the State of New York's intervention, the New York Court of Appeals affirmed that order. Loretto v. Teleprompter Manhattan CATV Corp., 53 N.Y.2d 124, 440 N.Y.S.2d 843 (1981). It addressed only the threshold argument, holding that Executive Law, section 828, was a valid exercise of the police power rather than a taking requiring just compensation. Notwithstanding, it acknowledged that the statute, in any event, provided for reasonable compensation as determined by the CATV Commission. Id. at 130-131, 142.[5]

On appeal, this Court unanimously upheld the validity of section 828 of the

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[5]The Court acknowledged that the Legislature had determined that landlords should be permitted compensation as determined reasonable by the CATV Commission, see Exec. Law, §828(1)(b), but in dicta only, expressed its view that the Legislature could have permitted that no payment need be made. Id. at 142.

Executive Law as a proper exercise of the police power. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 425 (1982). Nonetheless, in a 6-3 opinion, this Court rendered a "very narrow" holding affirming the "traditional rule" that "[the] minor but permanent physical occupation" constituted a taking for which just compensation was due. Id. at 421, 441.

Based on that "very narrow" ruling, this Court reversed and remanded to the New York Court of Appeals to consider the amount of compensation due. Id. at 441. It did not rule on the issue of whether state law already provided a method for just compensation, and noted that the Court of Appeals had not yet determined whether the nominal fee ordinarily awarded was adequate compensation. Id. at 425. This Court expressed no opinion on the amount due, but rejected any assumption that the high fees

exacted prior to the law's enactment would be proper. Id. at 441. In the dissenting opinion, Justice Blackmun stressed that "[h]appily, the Court leaves open the question whether §828 provides landlords like appellant sufficient compensation for their actual losses..." Id. at 456, n.12.

On remand, rejecting petitioners' separation of powers argument, the New York Court of Appeals unanimously held that section 828 of the Executive Law is constitutionally valid because it provides a method for determining reasonable, i.e., just compensation for both crossover and noncrossover situations. Loretto v. Teleprompter Manhattan CATV Corp., 58 N.Y.2d 143, 147-154, 459 N.Y.S.2d 743, 746-749 (1983). It thus adopted the alternative argument made by the defendants City et al. throughout these proceedings. It found that the CATV Commission could

properly determine, by regulation and administrative hearing, the amount of compensation due, but the lower Court was to retain jurisdiction for the purpose of reviewing any award of just compensation in the instant case. Id. at 149-150; see Exec. Law, §§816(3)(5), 828(1)(b); 9 N.Y.C.R.R. 598.1--598.7.

In addition, the Court of Appeals expressly rejected the bulk of plaintiff's other arguments on remand. Id. at 147-155. This included her persistent arguments of trespass, id. at 143, except to the extent, petitioner, "if so advised", decided to proceed with a trespass action against Group W for the ten-month period prior to the statute's effective date. Id. at 147-149. The Court also rejected her extended arguments that the New York Eminent Domain Procedure Law superseded the Executive Law, id. at 150-151, as well as various other

meritless alleged constitutional flaws, id. at 152-154.

The Court of Appeals did invalidate a single one of the Commission's regulations, 9 N.Y.C.R.R. §598.3, which had required that an owner's application for compensation be made within 60 days after October 30, 1973, or the date of installation, whichever was later. Id. at 154. Because section 598.3 could be construed as barring a landlord's claims prior to the receipt of notice of the right to just compensation, the Court found it alone invalid, without disturbing the constitutionality of the statute. Id.

In so doing, the Court stressed that plaintiff never raised the notice issue until the case reached the Court of Appeals on remand. Id. The Court found that the notice issue was not properly before it, and "... appears from the stipulated facts no longer to present a problem," because both

Teleprompter and the Commission had immediately agreed to waive and repeal that regulation Id. Following this Court of Appeals' decision almost uniformly rejecting all of plaintiff's claims on remand, petitioner's motion for reargument was denied, by order entered April 28, 1983. Loretto v. Teleprompter Manhattan CATV Corp., 59 N.Y.2d 761, 463 N.Y.S.2d 1030 (1983).

Thereafter, by Order and Judgment on Remittitur dated July 11, 1983, the Supreme Court affirmed Special Term's earlier 1979 judgment dismissing petitioner's complaint. It modified the order solely by: (i) declaring Regulation 598.3 to be invalid, (ii) permitting petitioner to apply to the Commission for payment of "just compensation," and (iii) permitting petitioner to proceed with her individual action in trespass against Group W, "if she be so

advised," for the period prior to the enactment of Section 828. Petitioner has taken no steps in furtherance of any of these claims.

In particular, she never submitted an application to the CATV Commission, and thus never received a determination of compensation due her. Similarly, she never pursued a trespass action against Group W for the 10-month period prior to the law's enactment. Further, at the time of her application, no other property owners had submitted applications for compensation to the Commission and had not done so through late 1987 (see A8).

b) The Attorneys' Fee Proceedings and Opinions Below

Instead of pursuing the above actions, a year and half later, in December 1984, plaintiff moved in Supreme Court, New York County, for attorneys' fees and costs,

alleging entitlement under 42 U.S.C. section 1988 and under N.Y. Civil Practice Law and Rules ("CPLR"), section 909, allowing fees in state class actions. She sought a total of $503,590.00 against Group W, successor to defendant Teleprompter, $454,677.00 against the City of New York, and $270,136.50 against the State of New York; she sought joint and several liability, and apportioned such fees based solely on the time of entry into the lawsuit. Defendant City and Group W Cable argued that petitioner was not entitled to fees on various grounds, and the State defaulted on the motion.

By order, and underlying opinion, entered June 25, 1985, the Supreme Court, New York County, denied the motion "as premature with leave to renew at the appropriate time" (A24-A43). Rejecting defendants' arguments, the Court found that petitioner was a "prevailing party" within

§1988 (A37-A38). Notwithstanding, it found that it was unable to assess the true impact of petitioner's and her counsel's efforts, until she proceeded to the CATV Commission for her "just compensation" (A42).[6] In December 1985, the Supreme Court, New York County, denied the reargument motions by petitioner and Group W (A45-A48).

By order entered February 10, 1987, the Appellate Division, First Department, affirmed without opinion, the lower Court's June 1985 order denying the attorneys' fees application (A21). Loretto v. Group W Cable, 127 A.D.2d 475, 511 N.Y.S.2d 542 (1st Dept., 1987). Upon cross-motions, by

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[6]The Court rejected the City's alternative argument that the action should be dismissed as against it based on petitioner's failure to establish the City's liability, i.e., showing a municipal policy resulting in a civil rights deprivation (A39), and failed to address its arguments based on its extremely limited intervention role in the lawsuit.

order of December 15, 1987, the Appellate Division granted reargument and adhered to its prior affirmance for the reasons stated thereafter (A1-A17). Loretto v. Group W Cable, 135 A.D.2d 444, 522 N.Y.S.2d 543 (1st Dept. 1987).

Specifically, the Appellate Division held that the lower Court had correctly denied the motion, but had erroneously found petitioner to be a "prevailing party" (A3). Upon its own thorough review of the litigation history and applicable precedent (A2-A11), the Appellate Division held that the establishment of a taking alone was insufficient to establish petitioner's 42 U.S.C. §1983 claim (A10-A11). Rather, until petitioner applied for just compensation, utilizing the Executive Law statutory scheme, and was denied such compensation, she had failed to plead sufficiently, much less prove, the denial of

any federal constitutional right (A11-A13) (citing, inter alia, Gomez v. Toledo, 446 U.S. 635 (1980) and Williamson County Planning Commission v. Hamilton, 473 U.S. 172 (1985)) (see text of opinion, reproduced in Group W's Brief in Opposition to Certiorari).[7]

On March 24, 1987, the Court of Appeals denied petitioner's motion for leave to appeal the Appellate Division's orders (A84). Loretto v. Group W Cable, 71 N.Y.2d 802, 527 N.Y.S.2d 768 (1987).

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[7]The Appellate Division also rejected petitioner's claims to entitlement under state law, CPLR 909, allowing discretionary fees in class actions (A13-A17). Noting that no notice was ever given to the putative class, it found that alleged members thereof "are consigned to essentially the same procedures for obtaining compensation as ... existed ever since the enactment of Executive Law §828 [in 1972]" (A13).

REASONS FOR DENYING THE WRIT OF CERTIORARI

THE ORDERS BELOW ARE NON-FINAL. IN ANY EVENT, THE COURT BELOW FOLLOWED WELL-SETTLED PRINCIPLES OF LAW ESTABLISHED BY THIS COURT IN DETERMINING THAT PETITIONER IS NOT A PREVAILING PARTY WITHIN THE MEANING OF 42 U.S.C. §1988, WHERE, INTER ALIA, SHE FAILED TO PLEAD AND PROVE A DENIAL OF JUST COMPENSATION UNDER 42 U.S.C. §1983.

MOREOVER, UNDER APPLICABLE PRECEDENT, PETITIONER MAY NOT RECOVER ATTORNEYS' FEES FROM THE CITY OF NEW YORK WHICH HAD NO SUBSTANTIVE LIABILITY ON THE MERITS.

Petitioner contends that this case merits review for three reasons (Pet., pp. 21-22). She argues first that there is a "chilling effect" upon resort to New York courts for vindication of constitutional rights and by an alleged "evading" of a directive of this Court (Pet., pp. 21, 23-26). Second, she argues that it offers a "vehicle" for more precise

definition of the concepts of a section 1983 cause of action and of "prevailing" under section 1988 (Pet. br., pp. 26-37). Thirdly, she claims it presents the issue of entitlement to interim awards in protracted litigation, "even if the success is deemed to be only at an interim stage" (Pet., pp. 22, 38-43).

As we will show below, these orders are not final. In addition to being non-final, the orders should not be reviewed because we submit that, under well-settled principles of law established by this Court, petitioner did not demonstrate that she met any of the prerequisites for a fee award under 42 U.S.C. §1988. Of major importance, as the Appellate Division correctly held, she has never proved a violation of any federal constitutional right under 42 U.S.C. §1983. The decision below is not in conflict with any decision of this Court. Further, there

is no compelling federal issue of wide-spread public importance. This case was essentially unsuccessfully prosecuted in trespass and unsuccessfully challenged the constitutionality of New York Executive Law, section 828, authorizing cable television equipment installation on a landlord's premises and providing compensation therefore.

While the petitioner obtained a "very narrow" holding that there was a taking based on what this Court termed the "traditional rule," 458 U.S. at 441, she has never utilized the available Executive Law, §828, statutory procedures for obtaining just compensation, essentially intact since 1972. Thus, she has never been denied just compensation. Instead, she waited almost two years after a judgment dismissing her complaint, but retaining jurisdiction to review any such award, to seek a huge

award of attorneys' fees. Thus, further review is unwarranted and the petition for a writ of certiorari should be denied.

(1)

As a threshold matter, the orders for which appeal is sought are non-final state court judgments, thereby depriving this Court of jurisdiction under 28 U.S.C. §1257(2). See, e.g., Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 67-72 (1948); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476-487 (1975). The Appellate Division opinion makes clear that petitioner may seek just compensation from the CATV Commission (" . . . [petitioner], who to date has not utilized the procedures to obtain compensation which have existed in substantially the form they do today since the enactment of Executive Law §828 in 1972, cannot now make a §1983 claim" (A12) (emphasis added)). Indeed, the Court of

Appeals' 1983 opinion instructed the lower Court to retain jurisdiction to review any eventual award. See Loretto v. Teleprompter Manhattan CATV Corp., supra, 58 N.Y.2d at 147, 459 N.Y.S.2d at 746 (see also A82 -- lower Court judgment retaining jurisdiction). Petitioner has not yet pursued these state administrative proceedings, and, further, she has never renounced her opportunity to do so. See, e.g., Department of Banking v. Pink, 317 U.S. 264, 268 (1942) (test of finality is " . . . whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that the adjudication is not subject to further review by a state Court").

Furthermore, in seeking review of the Appellate Division orders, petitioner sought leave to appeal to the New York Court of Appeals, rather than claiming an appeal as

of right on constitutional grounds. Compare New York CPLR 5602(a)(1)(i) with CPLR 5601(b). We believe it is understandable why she did not seek review as of right, since, as discussed below, there is no substantial constitutional question directly involved herein. In any event, however, even in seeking permission to appeal under CPLR 5602(a)(1)(i), there must be a "final" determination. Here, the Court of Appeals denied the motion (A84), but without indicating if it was for want of the jurisdictional statutory prerequisite "final" determination. Based on all the above, however, the orders are non-final and, accordingly this Court lacks jurisdiction. The petition should thus be denied. See Minnick v. California Department of Corrections, 452 U.S. 105, 122-127 (1980).

(2)

In any event, pursuant to 42 U.S.C. section 1988, in any action or proceeding to enforce a provision of section 1983, a court, "... in its discretion, may allow the prevailing party ..." reasonable attorneys' fees as part of the costs. 42 U.S.C. §§ 1983, 1988; see Maine v. Thiboutot, 448 U.S. 1 (1980). While such an award should ordinarily be granted "unless special circumstances would render such an award unjust," Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968), a plaintiff must establish the two prerequisities: (1) that she stated a claim pursuant to section 1983, and (2) that she was a prevailing party.

In the instant case, petitioner failed on both counts. First, she never alleged and proved a constitutional violation since she has never sought nor been denied just

compensation. Williamson County Regional Planning Commission v. Hamilton, 473 U.S. 172, 194-195 n.13 (1985) ("... a property owner has not suffered a violation of the Just Compensation clause until [she] has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation"). As reviewed above, ante, pp. 3-14, and in Group W's Brief in Opposition to Certiorari, Executive Law, §828, provides an adequate means for seeking just compensation in the first instance from the State Commission on Cable Television, with judicial review thereof, as it has always done since its passage in 1972 by the New York State Legislature.

Moreover, petitioner is not a prevailing party within the meaning of 42 U.S.C. §1988. Hewitt v. Helms, ___ U.S. ___, 107 S.Ct. 2672, 2675 (1987), citing Hanrahan v.

Hampton, 446 U.S. 754, 757 (1980) (per curiam). See also Gingras v. Lloyd, 740 F.2d 210, 212 (2d Cir. 1984); New York City Unemployment and Welfare Council v. Brezenoff, 742 F.2d 718, 724 n.4 (2d Cir. 1982). The minimal results of this lawsuit, an interlocutory "very narrow" ruling that there was a "traditional" taking, and an invalidation of a minor CATV Commission regulation, never challenged in the underlying suit, does not constitute substantive relief on the merits, and clearly petitioner did not establish any liability on the merits on the part of defendants, particularly defendant City. Kentucky v. Graham, 473 U.S. 159 (1985).[8]

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[8]Petitioner's reliance on Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (a non-civil rights case) and Bradley v. Richmond School Board, 416 U.S. 696 (1974) (Pet., pp. 35-36) is misplaced, since she

(Footnote Continued)

Significantly, petitioner ignores this Court's own statement that it rendered a "very narrow" holding and used a "traditional" and "historical" test. Loretto v. Teleprompter Manhattan CATV Corp., supra, 458 U.S. at 435-439, 441 (see Pet., p. 11). Further, this Court firmly rejected petitioner's contention that Executive Law, §828, was an invalid exercise of the police power and thus unconstitutional. Accordingly, on this record, and for all the above reasons and those stated in Group W's Brief in Opposition, petitioner was not a prevailing party within the meaning of 42 U.S.C. §1988.

While petitioner now claims that she brought this suit only to obtain a determination of entitlement to just

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(Footnote Continued)
has never established any liability on the merits, as required in both.

compensation for the taking caused by installation of CATV components (Pet., p. 9), as detailed above, ante, pp. 4-5, she primarily sought a huge damages award based on the state law of trespass. Indeed, following this Court's decision, on remand in the Court of Appeals, petitioner argued that her action was exclusively in trespass despite this Court's decision that there was a "taking."[9]

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[9]For example, in her 145 page Main Brief on Remand ("Rem. br."):

> A. She opened her argument to the Court of Appeals with the statement that "This is a class action in trespass. . . ." (Rem. br., p. 1 (emphasis in original).
>
> B. Her first subheading, stated: "This Action Is Exclusively In Trespass. . . ." (Rem. br., p. 15).
>
> C. Plaintiff further asserted: "The Supreme Court's Decision That There Has Been a 'Taking'

(Footnote Continued)

In light of the above, this action was not brought to further the congressional policy of facilitating access to the judicial process for victims of civil rights violations who might not otherwise be able to afford it. Indeed, petitioner waited almost two years to even seek attorneys' fees and then submitted a legally insufficient application (see post, pp. 32-35).

(3)

Moreover, with respect to the City of New York, petitioner did not, and could not, state a claim under 42 U.S.C. §1983, i.e., she did not allege or establish that the City, through official custom or policy, acted to deprive her of a constitutional right. Monell v. Department of Social Services, 436 U.S.

(Footnote Continued)
. . . Has not Converted The Nature of this Action From Trespass" (Rem. br., p. 18).

658 (1978). Thus, following the City's intervention in the public interest, ante, pp. 5-6, petitioner never amended her complaint to state a cause of action against the City.

In any event, petitioner never established any substantive liability by the City on the merits, thereby precluding any fee award against it. Kentucky v. Graham, 473 U.S. 159 (1985), see also Young v. City of Killeen, Texas, 775 F.2d 1349, 1351, 1354 (5th Cir.), reh. denied, 778 F.2d 790 (5th Cir. 1985); Annunziato v. The Gan, Inc., 744 F.2d 244, 253 (2d Cir. 1984). Whereas the Court of Appeals on remand allowed the extremely limited relief, i.e., a possible trespass of action against Group W for a ten-month period and invalidating a minor one of the State CATV Commission regulations, nothing was directed as to the

City. Cf. Counsel v. Dow, 849 F.2d 731, 739-741 (2d Cir. 1988).[10]

Finally, even if, arguendo, there was no such bar to a fee award against the City, it should be denied because the "special circumstances" in this case, would render it unjust. Newman v. Piggie Park Enterprises, Inc., supra, 390 U.S. 402; see Northcross v. Memphis Board of Education, 412 U.S. 427 (1973). In particular, the City's extremely limited intervention role warranted

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[10]We note that, in seeking attorneys' fees herein, petitioner stated below, without equivocation, that the Teleprompter (Group W Cable) defendants were "the real parties in interest." In this Court, the State of New York expressly designated itself "... the true party in interest ... since the issue is the constitutionality of one of its statutes which has statewide application and is of vital public concern." Indeed, the Supreme Court, New York County, found that plaintiff's action was "... for all practical purposes aimed at the Executive Law and the State Commission on Cable Television and the conduct of the Attorney General" (A39).

a denial of fees against it. See, e.g., Kelley v. Metropolitan County Bd. of Educ., 773 F.2d 677, 684-85 (6th Cir. 1985) (en banc), cert. denied, 474 U.S. 1083 (1986) (intervenors not liable for statutory fees where "there is no evidence that the intervenors in any way interfered with the progress of the litigation");[11] Rose v. Nebraska, 748 F.2d 1258, 1264 (8th Cir. 1984), cert. denied, sub nom. Lutjeharms v. Rose, 474 U.S. 817 (1985) (where the state

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[11]Most tellingly, on remand in the Court of Appeals, the City submitted a single 2½ page brief. It succinctly argued (as it had throughout the action) that section 828(b) of the Executive Law provided for just compensation by requiring payment of a "reasonable" amount which could constitutionally be established by the State Cable Commission. This is precisely what the Court of Appeals held. In contrast, petitioner submitted a 145-page main brief, as well as very lengthy reply and sur-reply briefs. Group W submitted briefs over 100 pages long, while the State's two briefs numbered about 40 pages.

commissioner of education, the governor, and the local school board had been found liable for fees, the United States Court of Appeals for the Eighth Circuit modified the award by making the commissioner of education, who had been the central actor, the sole party liable for fees; the local school board was merely doing what it had been told to do by the commissioner, and the governor had absolutely no involvement in the disputed acts).

(4)

A final reason for denying the writ is that, even if, arguendo, petitioner was a prevailing party for the purposes of a fee award, her fee application was legally insufficient thereby barring an award. See, e.g., Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983). After petitioner waited an unreasonable and prejudicial 17 months after the July 1983

dismissal order on remittitur to make this application (see, e.g., Baird v. Bellotti, 724 F.2d 1032 (1st Cir.), cert. denied, 467 U.S. 1227 (1984)), even then she failed to provide the court with contemporaneous time records to allow a determination of whether the hours claimed were reasonably and productively spent. Hensley v. Eckerhart, 461 U.S. at 437. After defendants City et al. opposed her application on that basis, the two firms submitted some minimal documentation, but without any breakdown as to the separate trespass and other claims litigated nor an adequate description of the work performed.

Thus, in seeking compensation for some 3000 hours, the "joint application" on behalf of two firms, petitioner's lead counsel, representing her here, claimed 2000 hours, while its "of counsel" firm claimed 1000 hours. There was no explanation of the separate functioning of the two firms nor a

breakdown of the work by separate successful and unsuccessful claims. Id. at 437; Copeland v. Marshall, 641 F.2d 880, 891-892 (D.C. Cir. 1980) (en banc) (duplication found where attorneys unreasonably doing same work, as in this case).

Indeed, the two supporting affirmations reflected almost totally similar work after 1977, including the preparation and drafting of briefs. For instance, for the work done in the Court of Appeals on remand, the lead counsel seeks payment for about 300 hours (6 50-hour weeks), while the "of counsel" firm seeks payment for about 450 hours (9 50-hour weeks). Clearly, they did not prove by clear and convincing evidence that 750 hours or 4 months work was not duplicative and excessive, where the New York Court of Appeals rejected nearly all of

petitioner's continued claims of trespass, statutory and constitutional flaws.[12]

(5)

Based on all the above, and the very narrowness of this case, petitioner's "chilling effect" arguments lack substance. Furthermore, petitioner does not, and

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[12]Other insufficiencies included a failure to give any professional background for many individual lawyers nor paralegal qualifications, and improperly seeking paralegal fees based on hourly rates charged, rather than as expenses based on wages paid. See, e.g., City of Detroit v. Grinnell Corp., 495 F.2d 448, 473 (2d Cir., 1974). Moreover, petitioner improperly calculated the fees using her then current hourly rates, rather than the historic rates used in multi-year cases. New York Association for Retarded Children v. Carey, 711 F.2d 1136, 1153 (2d Cir. 1983). Nor was she entitled to her requested 15% multiplier, Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air., ___ U.S. ___, 107 S.Ct. 3078, 3086 (1987); Blum v. Stenson, 465 U.S. at 898-899, nor her request for fees and expenses with respect to the fee application (which she had not sought below). New York Association for Retarded Children v. Carey, 711 F.2d at 1148.

cannot, substantiate her claim that in some unspecified manner the Court of Appeals on remand "evaded" this Court's directive (Pet., p. 22), and, obviously, she never sought review by this Court.

So too, the narrowness of this case presents no opportunity for this Court to define further the concepts of a §1983 cause of action and a §1988 "prevailing party". Indeed, this Court has given recent and ample guidance in the area. See, e.g., North Carolina Dept. of Transportation v. Crest Street Community Council, 479 U.S. 6, 107 S.Ct. 336 (1987); Hewitt v. Helms, ____ U.S. ____, 107 S.Ct. 2672 (1987); Kentucky v. Graham, 473 U.S. 159 (1985); Williamson County Regional Planning Commission v. Hamilton, 473 U.S. 172 (1985). Similarly, this case presents no opportunity for this Court to examine the efficacy of interim fee awards where, so far, petitioner has in

essence obtained only interlocutory rulings which may effect a disposition on the merits. Hanrahan v. Hampton, supra, 446 U.S. at 759. Further, while this Court has rejected a rule of strict proportionality of a fee award based on the amount of damages a civil rights plaintiff actually recovers, City of Riverside v. Rivera, 477 U.S. 561, ___, 106 S.Ct. 2686, 2694 (1986), it nevertheless held that the amount of damages is a "certainly relevant" consideration to the amount of fees awarded. Id. at 2694.

In conclusion, petitioner has failed to demonstrate that she is a "prevailing party" within the meaning of 42 U.S.C. §1988, because, inter alia, she has never proved any violation of her constitutional rights. This Court upheld the Executive Law, section 828, cable television statutory scheme as constitutional, Loretto v. Teleprompter Manhattan CATV Corp., 419 U.S. at 425,

and, as recognized by the Appellate Division, the procedures for obtaining just compensation are essentially the same ones that have existed since the statute's enactment in 1972 (A13). The narrowness of this case is clear, since it was brought primarily as a trespass action, and prosecuted as such after this Court's decision on remand (see, e.g., Petitioner's Br. on Remand in Court of Appeals, p. 18, stating "The Supreme Court's Decision that there has been a 'Taking' ... Has not Converted the Nature of this Action From Trespass"). In light of all the above, therefore, the petition should be denied.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

August 22, 1988

Respectfully submitted,

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Supreme Court, U.S.
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CLERK

No. 87-2100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JEAN LORETTO, on behalf of herself
and all others similarly situated,

Plaintiff-Petitioner,

v.

GROUP W CABLE, INC. and CITY OF NEW YORK,

Defendants-Respondents,

– and –

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE DIVISION, FIRST DEPARTMENT,
OF THE SUPREME COURT OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

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Additional Question Presented

Whether an intervenor against which the plaintiff has not sought the imposition of substantive liability may be liable for fees under 42 U.S.C. § 1988?

(Issue raised by City and State Respondents. See Point IV A below.)

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A R G U M E N T

I. PETITIONER PREVAILED WITHIN THE MEANING OF 42 U.S.C. § 1988

Respondent's entire argument on this point rests on the fallacious premise that a remedy for obtaining constitutional just compensation has existed within New York's Executive Law § 828 from the beginning. Therefore, Respondents say, Petitioner could not have prevailed because she has never pursued the supposedly available remedy.

In fact, Petitioner's efforts created the previously non-existent administrative remedy for just compensation. When this case originally reached the United States Supreme Court, the New York Court of Appeals had declared that Section 828 did not require the payment of any compensation and merely permitted compensation or denial of compensation

in the absolute discretion of an administrative agency and not as a matter of constitutional right. 53 N.Y.2d 124, 138, 143, 440 N.Y.S.2d 843, 849, 852 (1981); see Petition pages 28-32.

Thus, when this Court determined that Petitioner had suffered a "taking" (458 U.S. 419), not only (1) had there been a taking but (2) Petitioner had already been denied just compensation as the Court of Appeals had ruled that Section 828 did not provide a remedy for obtaining just compensation.

Significantly, Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), on which Respondents rely so heavily, expressly contemplates precisely such a situation as is presented here:

> If the government has provided an adequate process for obtaining compensation, and if resort to that process

> "yield[s] just compensation," then the property owner "has no claim against the Government for a taking." * * * Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation. (473 U.S. at 194-95; emphasis added)

Quite obviously, in Williamson County, the Court did not contemplate that the property owner would have to pursue a subsequently created administrative remedy in order to be deemed to have prevailed on a taking claim based on the absence of such a remedy.

Group W attempts to belittle Petitioner's role in causing the Commission's 60 day, no-notice statute of limitations to be declared invalid. But the Court of Appeals' declared that it was invalidating the subject regula-

tion as a result of this action. (A52-A53, A73-A74).

Respondents also suggest that the dismissal of Petitioner's complaint establishes that she did not prevail. (Group W Br. 29; A.G. Br. 4). The trial court, however, held the dismissal to be "merely a technical termination of the complaint wherein the 'just compensation burden' has been shifted to a state agency . . .." (A38). As Hewitt v. Helms, 482 U.S. ___, 107 S. Ct. 2672 (1987), stresses, it is the result that counts, not whether or not plaintiff has obtained a judgment. Here, Petitioner has gained significant results in establishing liability for herself and other property owners and voiding the Cable Commission's statute of limitations.

The City also suggests that this was not actually a Section 1983 action but solely an action in trespass (City Br. 28-30), notwithstanding the unreversed finding of the trial court that the action was brought to enforce federally-protected rights. (A35-A36). The City's unduly selective quotation from point headings in Appellant's Brief on remand to the Court of Appeals (City Br. 29-30) fails to note that Appellant's Complaint asserted "taking" grounds, her original appeal to this Court was entirely based on the taking issue, and, although on remand Appellant for tactical reasons stressed the trespass ground (on the premise that Section 828 was unconstitutional as a condemnation provision), she also devoted 16 pages of her Brief on Remand to arguing the measure of condemnation damages.

II. IMPOSING FEES ON GROUP W WILL NOT DEPRIVE IT OF PROPERTY WITHOUT DUE PROCESS

Group W's novel constitutional theory that imposing fees denies due process is utterly devoid of merit.

Under Section 1988, counsel fees are a component of costs. Hutto v. Finney, 437 U.S. 678, 695 ff. (1978), reh'g denied, 439 U.S. 1122 (1979). They are imposed as an incident of participating in litigation and without regard to fault.

This Court has held that due process is not violated by a state statute which imposes attorneys' fees against a life insurance company if it fails to pay policy benefits on demand even though payment was resisted in good faith and upon reasonable grounds. Life & Casualty Ins. Co. v. McCray, 291 U.S. 566 (1934). Awarding attorneys' fees

under civil rights legislation has been specifically upheld. Maher v. Gagne, 448 U.S. 122 (1980). Cf. Bankers Life & Casualty Co. v. Crenshaw, __ U.S. __, 108 S. Ct. 1645 (1988) (sustaining 15% statutory penalty imposed on losing appellant against equal protection attack, and favorably citing Life & Casualty Ins. Co. v. McCray, supra).

III. GROUP W's "GOOD FAITH" DOES NOT RELIEVE IT OF LIABILITY FOR FEES

Group W's position that it is immune from liability for counsel fees because it was "found" to have acted in "good faith" by the Court of Appeals is totally unsustainable. First, the Court of Appeals' "finding" pertained to an entirely different issue and cannot fairly be extended to the question of liability for attorneys' fees. Second,

under Section 1988, good faith, or its absence, is utterly irrelevant.

The "good faith" issue arose in the context of whether Group W could avail itself of Section 828 procedures when it had made its installations -- i.e. had already taken private property -- without making prior compensation. Petitioner had asserted that failure of a private entity exercising condemnation powers to compensate in advance casts its action outside of the statutory taking license and renders Group W subject to damages for trespass. In response, the Court of Appeals, while recognizing that "advance payment or the provision of security for payment of compensation is the general rule when property is taken for a private use," nonetheless ruled that it would be inappropriate to apply that requirement

rigidly here because "TelePrompter has proceeded in good faith under a statutory license not conditioned upon the advance payment of or security for compensation . . .." (A68-A69).

While that "finding" may be supported by the mere circumstance that a statute existed which permitted installation without advance compensation or security, the "finding" was clearly not one of fact as no evidence on the issue had been submitted.* To say that Group W acted "in good faith" so as not to have forfeited the right to have just compensation determined by the Commission is a far cry from saying that it acted in such "good faith" as to be immune from liability for attorneys'

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*The Court of Appeals lacks power to make factual findings and may only review them in limited, inapplicable circumstances. CPLR § 5501(b).

fees in a Section 1983 action. The Court of Appeals simply did not address the latter issue.

More importantly, good faith is irrelevant under Section 1988. Indeed, Section 1988 was adopted precisely in order to overcome the ruling in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), that the common law precluded an award of attorneys' fees in the absence of special circumstances such as that defendant had acted in bad faith. See Gagne v. Maher, 594 F.2d 336, 339 (2d Cir. 1979), aff'd, 448 U.S. 122 (1980).

IV. THE CITY AND STATE ARE LIABLE FOR FEES

A. Appellant Prevailed against the City and State

In arguing that Appellant did not prevail against the City and State be-

cause she sought no substantive relief against them (City Br. 30-34; A.G. Br. 4), those Respondents* present an additional issue worthy of this Court's review, namely whether a voluntarily intervening party which actively participates in the case but against which no substantive liability is sought, may be liable for attorneys' fees under Section 1988.

The meaning of the language in Kentucky v. Graham, 473 U.S. 159 (1985) -- to the effect that a prevailing plaintiff may not recover fees from a party against which it has not prevailed nor from a non-party -- requires clarification in the context of a case

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*It must be noted that the Attorney General's standing to pose anything but jurisdictional issues is at best doubtful. At the trial court level, the Attorney General defaulted on the fee motion.

where fees are sought against voluntary intervenors whose participation has increased the burden on plaintiff. That issue was not addressed by Kentucky v. Graham.

The Seventh Circuit, however, has faced the intervenor issue squarely and determined that Kentucky v. Graham does not preclude an award of attorneys' fees under Section 1988 against intervenors because their "presence in the lawsuit was both voluntary and self-initiated." Charles v. Daley, 846 F.2d 1057, 1067 (7th Cir. 1988).

Only one of the cases the City and State cite even remotely bears on the intervenor issue, and then only in dictum. Kelley v. Metropolitan County Board of Education, 773 F.2d 677, 684-685 (6th Cir. 1985) (en banc), cert. denied, 474 U.S. 1083 (1986) (plaintiff

may not recover fees from defendant Board for costs of opposing unnamed intervenors and would not have been able to recover fees from the intervenors had it chosen to try to do so).

In contrast to the dictum in Kelley, fees have been awarded under Section 1988 in other (pre-Kentucky v. Graham) cases against intervenors even though they were not subject to substantive liability. Haycraft v. Hollenbach, 606 F.2d 128 (6th Cir. 1979) (distinguished in Kelley on the ground that the intervenor in Haycraft obstructed the litigation, even if in good faith); Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 460 F. Supp. 1054 (E.D. Wis. 1978) (State liable for attorneys' fees where it intervened to support constitutionality of State statute); Vulcan Society of Westchester

County, Inc. v. Fire Dep't, 533 F. Supp. 1054, 1062 (S.D.N.Y. 1982); Akron Center for Reproductive Health v. City of Akron, 604 F. Supp. 1268, 1273 (N.D. Ohio 1984). See Moten v. Bricklayers, Masons and Plasterers Int'l Union, 543 F.2d 224, 239 (D.C. Cir. 1976) (fees imposed against participant which failed to qualify as intervenor).

Liability of the City and State for fees would also depend on Petitioner having "prevailed" against them. Charles v. Daley, supra, held that the mere fact that plaintiff defeated the position advanced by the intervenors constituted "prevailing" as to them even though no substantive liability was imposed against them on the merits. Furthermore, in light of this Court's reversal of the New York decisions that the State's Executive Law § 828 did not

effect a taking, the consequence that the State Cable Television Commission is now required to award just compensation where it had not been before, and the invalidation of the State Commission's 60-day statute of limitations, the Attorney General's contention that no substantive relief was granted against the State (A.G. Br. 4) is simply untenable.

B. The State Lacks Immunity

This Court has held that, by adopting the Fourteenth Amendment, the States abrogated their sovereign immunity as to Fourteenth Amendment (including Civil Rights Act) issues; implicitly, a State may be held liable for attorneys' fees under the Civil Rights Act. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

Kentucky v. Graham, supra, indeed does hold that fees cannot be obtained against the State on a respondeat superior theory where its officers, acting beyond the scope of their authority, have incurred Civil Rights Act liability. But, here, the Attorney General acted well within his express legislative authority to intervene in support of the constitutionality of State laws (Executive Law § 71), this Court granted substantive relief against the State (not its officers) in determining that Section 828 effected a taking, and the Court of Appeals invalidated the State Commission's statute of limitations.

V. THE ORDERS APPEALED FROM ARE FINAL

The City argues unpersuasively that the orders below are not "final" because Appellant could pursue an administrative

remedy for "just compensation" and, depending on her success in that endeavor (including, presumably, exhaustion of all available appeals), she might renew her application for counsel fees some years hence. (City Br. 22-24).

A State court decision is "final" for Supreme Court jurisdictional purposes if no further proceeding will affect the federal claim, further proceedings are unlikely to raise additional federal claims, or immediate review would be the best way to avoid economic waste and delayed justice. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476 ff. (1975); Florida v. Meyers, 466 U.S. 380 (1984). Here, no further proceedings can alter the federal issue the case presents: whether, upon finally prevailing on the liability issue, where

only damages remain to be determined and, then, only through an entirely independent administrative proceeding, fees are presently awardable either on a final or interim basis. As in Florida v. Meyers, further State proceedings might moot the federal issue presented here if they result in an award of fees some years from now, but no further State proceedings can change or sharpen the federal issue. The case falls squarely within two of the four categories described by this Court in Cox Broadcasting Corp. v. Cohn, supra -- further State proceedings would render the federal issues moot or there would be a serious erosion of federal policy or untoward delay in its effectuation if there were a refusal to review.

Contrary to the City's speculation, the reason Appellant did not appeal in

the State court system on constitutional grounds was that the issue below was not constitutional. CPLR § 5601(b). In any event, it hardly follows that the test of appealability in State court procedure is determinative of the jurisdiction of this Court. Nor would it be appropriate to speculate, as the City suggests this Court do, that the Court of Appeals exercised its discretionary right to deny leave to appeal on the ground that the orders below were not final.

VI. CONSIDERATION OF THE SUFFICIENCY OF THE FEE APPLICATION IS INAPPROPRIATE

The City's grabbag of alleged insufficiencies in Appellant's fee application (City Br. 34-37) should not be considered. They were not addressed by the Courts below as the fee application

was denied for other reasons. For the most part, the alleged insufficiencies (which are, in any event non-existent) could be easily dealt with through a hearing.

The City's contention that the fee application was tardily submitted (City Br. 34-35) should be denied out of hand. The City never raised this point below. Moreover, the City never offered any evidence that it had been prejudiced by any delay, as it must to succeed on a claim of laches. Baird v. Bellotti, 724 F.2d 1032 (1st Cir.), cert. denied, 467 U.S. 1227 (1984).

Respectfully submitted,

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